Petition

81-1009

No. -

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In the Supreme Court of the United States

OCTOBER TERM, 1981

AUBURN NEWS COMPANY, INC., *et al.*,
PETITIONERS,

v.

PROVIDENCE JOURNAL COMPANY,
SOUTHERN NEW ENGLAND NEWSPAPER
DISTRIBUTORS, INC.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Of Counsel:
AUSTIN T. STICKELLS
765 Commonwealth Ave.
Boston, MA 02215

FRANK LICHT, Esq.
RICHARD A. LICHT, Esq.
LETTS, QUINN & LICHT
1616 Hospital Trust Tower
Providence RI 02903

LEONARD DECOF, Esq.
DECOF & GRIMM
One Smith Hill
Providence, RI 02903

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QUESTIONS PRESENTED

Petitioners Auburn News Company, Inc., *et al.*,[1] respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on September 23, 1981, upon the following questions:

(a) Is vertical integration which eliminates an independent distribution system valid *per se* because it is allegedly based on business efficiency grounds, notwithstanding unreasonable restraints on competition, attempts to monopolize and abuse of monopoly power, all in violation of Sections 1 and 2 of the Sherman Act?

(b) Should a monopolist be preliminarily enjoined from terminating its independent distributors where their termination will further entrench the monopolist's market power and raise barriers to entry for potential competitors?

(c) Should a monopolist which entered a price fixing conspiracy with its independent distributors to set resale prices be preliminarily enjoined from terminating those distributors as part of its effort to gain control over price once the conspiracy has begun to fall apart?

(d) In light of the conflict between the First Circuit and the Second, Seventh and other Circuits, need the Plaintiff make as persuasive a showing that he will succeed on the merits in order to obtain the issuance of a preliminary injunction where the balance of harm substantially tips in favor of the Plaintiff?

(e) May a preliminary injunction be ordered where antitrust treble damages might be recovered?

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[1] The Petitioners are as follows: Auburn News Company, Inc.; Nicholas Calitri d/b/a Calitri News Service; Crescent News Service, Inc.; East Providence News Service Inc.; Hillside News Service Inc.; Thomas J. Ames d/b/a North Kingston News; Frederick E. and Arleen Gillett d/b/a Rumford News Service; Gordon I. Pierce; Warren News Service, Inc.; West Shore Road News Service, Inc.; Woodlawn News Service; Norman T. Zolkos d/b/a Zolkos News; South County News Co.

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Opinion Below

The opinion of the United States Court of Appeals for the First Circuit, reported at 659 F.2d 273, appears in the Appendix hereto at page A-24. The opinion rendered by the United States District Court for the District of Rhode Island is reported at 504 F. Supp. 292, and is also included in the Appendix hereto at page A-1. The Order of the District Court dated December 23, 1980, entered pursuant to that opinion is also included in the Appendix hereto at Page A-32.

Jurisdiction

The judgment of the Court of Appeals below is dated and was entered on September 23, 1981. A timely petition for rehearing was denied on October 22, 1981, and on October 23, 1981, the Court of Appeals entered an order staying the issuance of its mandate pending the filing of this petition by November 30, 1981. This petition was filed within the time prescribed by the aforesaid order, and within 90 days of the entry of judgment. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

United States Code, Title 15:

> §1. Trusts, etc., in restrant of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> §2. *Monopolizing trade a felony; penalty*
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on

conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

§26. *Injunctive relief for private parties; exception*

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, or corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which Plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such Plaintiff.

Statement of the Case

A. *The Parties and Background*

The Petitioners consist of sole proprietorships, family partnerships and family corporations, each of which is an independent news dealer who purchases newspapers at wholesale and

resells them to his respective home delivery or retail store customers in the Rhode Island area.

The Respondent Providence Journal Company (the "Journal") publishes two daily newspapers each week day and also publishes Saturday and Sunday newspaper editions (collectively "the Journal papers"). The Journal papers are the only statewide newspapers published in Rhode Island and have been distributed through independent distributors for more than half a century. For some time, however, the Journal has threatened to terminate these independent distributors and has harassed those distributors who attempted to charge a home delivery price in excess of the resale price fixed by the Journal. In 1973, the Journal formed Respondent Southern New England Newspaper Distributors, Inc. ("SNENDI") as its wholly-owned subsidiary for the purpose of acquiring independent distributorships and eliminating competition. From 1973 through the summer of 1980, the Journal and SNENDI acquired 31 formerly independent distributorships, thereby gaining direct control over 50% of the relevant distribution market.

In 1979 and 1980, several distributorships attempted to increase their resale prices only to be threatened and ultimately thwarted by the Journal. Faced with attempts by independent distributors to depart from its established price structure, concerned over the threat of a new daily, and with the intention of maintaining its existing monopoly over newspaper publication in Rhode Island and establishing monopoly over newspaper distribution in Rhode Island, the Journal sent letters to its 32 independent newspaper distributors (including all of the Petitioners) on August 11, 1980, notifying them that the Journal would cease selling its newspapers to them effective September 8, 1980.

B. *The Proceedings Below*

On September 2, 1980, Petitioners filed their complaint together with a motion for a temporary restraining order which the United States District Court for the District of Rhode Island granted on September 4, 1980. Subject matter jurisdiction was conferred upon the District Court by 15 U.S.C. §§ 15 and 26, 28 U.S.C. §§ 1331 and 1337, and by principles of pendent jurisdiction. After extensive expedited discovery and seven days of hearing, the District Court rendered a detailed written opinion and enjoined Respondents from terminating Petitioners and from utilizing their customer lists, pending trial on the merits.

After concluding that Petitioners had established their own and a public interest requiring preliminary injunctive relief, the District Court in accordance with the applicable standards for preliminary relief, found, *inter alia:*

(a) a price fixing combination between the Journal and the Plaintiffs, a *per se* violation of Section 1 of the Sherman Act (A-10-11; 504 F. Supp. at 299-300);

(b) a conspiracy between the Journal and SNENDI to coerce the Plaintiffs into maintaining the Journal's price schedule, also a *per se* violation of Section 1 of the Sherman Act (A-11; 504 F. Supp. at 300);

(c) a combination and conspiracy between Respondents designed to lessen competition by eliminating Plaintiffs from the newspaper distribution market, resulting in the entrenchment of Defendants and the raising of barriers to entry to potential competing newspapers in violation of Section 1 of the Sherman Act (A-13-14; 504 F. Supp. at 301);

(d) the possession of monopoly power by the Journal and actions by the Journal which constitute violations of Section 1 of the Sherman Act and which also constitute abuse of monopoly power in violation of Section 2 (A-17-18; 504 F. Supp. at 303);

(e) the use of monopoly power by the Journal to raise barriers to entry by competitors in violation of Section 2 of the Sherman Act (A-18; 504 F. Supp. at 303); and

(f) the use by the Journal of its position of dominance in the primary market to attempt to monopolize the secondary market for the distribution of newspapers in Rhode Island, also in violation of Section 2 of the Sherman Act (A-19-20; 504 F. Supp. at 303-304).

On appeal from the grant of preliminary relief, the United States Court of Appeals for the First Circuit rendered an opinion on September 23, 1981, and entered judgment reversing the order of the District Court.

A brief examination of the District Court opinion preliminarily enjoining the Journal Company from terminating Petitioners is appropriate to demonstrate that the First Circuit ignored important facts and findings in departing from accepted antitrust principles.

The Trial Judge found that Petitioners had presented evidence which "would support a conclusion of price fixing" in that the Journal had coerced them from raising the price of Journal newspapers to their carriers. (A-10; 504 F. Supp. at 299). It further found that the elimination of Petitioners from the newspaper distribution market would have an anti-competitive effect which would raise barriers to entry facing potential competitors of the Journal. (A-13-14; 504 F. Supp. at 301).

The District Court, after careful analysis of the relevant product and geographic markets and Respondent's power in those markets, concluded that "Plaintiffs have shown evidence of the probable existence of monopoly power." (A-18; 504 F. Supp. at 303). Moreover, the District Court found that, in terminating Petitioners, "Defendants will possess a monopoly in the field of newspaper distribution" and further ruled

> "If Defendants' vertical integration were found not to be violative of Sec. 1, it might nonetheless support a Sec. 2

claim inasmuch as it would raise barriers to entry to some extent in the product market." (A-18; 504 F. Supp. at 303).

In addition, the District Court observed:

> "Specific intent to monopolize however, can be inferred when the natural outcome of Defendants' actions is the elimination of competition. *Lorain Journal Co.* v. *United States*, 342 U.S. 143 at 154 (1951); *United States* v. *Griffith*, 334 U.S. 100, 105 (1948). It appears the natural result of Defendants' vertical integration would be the elimination of potential competition of distributors *inter se*. Further, such an integration would eliminate potential competition between Southern New England and the independents." (A-19; 504 F. Supp. at 304, (footnote eliminated)).

The findings of the Trial Judge specifically counter the conclusion of the Court of Appeals that the decision to terminate the Petitioners and other distributors was made for valid business reasons. The Trial judge acknowledged this assertion but in response specifically stated:

> "On the other hand, there is evidence of a different scenario. Plaintiffs point to evidence which indicates that the studies and reports of the Journal succeeded the decision to distribute directly, that the studies and reports were generated thereafter only to provide a basis for arguing the decision to go in-house was founded on sound business reasons and not anti-competitive intent." (A-3; 504 F. Supp. at 295).

This statement by the Trial Judge is graphically demonstrated by a memorandum dated September 20, 1979 prepared by Edward F. Hindle, the attorney for the Journal,

entitled "PROVIDENCE JOURNAL COMPANY—Re: Administration—DEVELOPMENT OF A PLAN FOR A CHANGE IN THE JOURNAL'S DISTRIBUTION SYSTEM," appended hereto at page A-36. The attestations of efficiency articulated by the respondents were conceived by Mr. Hindle to mask the Journal's desires for price control and to maintain its monopoly and merely to meet the legal needs of their anticipated defense to this action.

With respect to the finding that the Journal was a monopolist, depending on the definition of the product market the evidence demonstrated that the Journal's market share ranged from 68.5% to 90.04%. The Trial Judge found these market shares "remarkably impressive." (A-17; 504 F. Supp. at 303). The Trial Justice then concluded that credible evidence had been introduced to demonstrate that by terminating the Petitioners the Journal was maintaining its monopoly. Respondents expressly identified and sought to preclude additional newspaper competition. The evidence demonstrated that the Journal as a monopolist was raising barriers to entry to any competitors in the publication of statewide daily newspapers in Providence. The documents of the Journal demonstrate the concern over "a threat of a new daily" and a senior officer of the Journal testified as to the fact that the Journal was concerned that a weekly newspaper was considering becoming a daily and that a daily was considering publishing a Sunday paper.

The Trial Judge found that the Journal, a monopolist, entered into a price-fixing conspiracy with independent distributors to set a maximum resale price and then terminated those distributors to gain control over price once the conspiracy had begun to fall apart. The Court of Appeals overlooked the uncontradicted evidence, much of it contained in the Journal's own documents, that the refusal to deal was in

furtherance of the illegal price fixing scheme.[8] The linkage of the Journal's documents to the termination of petitioners is buttressed by the uncontradicted testimony of various petitioners of threats and harassment pertaining to contemplated and actual price increases.

The Circuit Court never addressed the substantial findings of the Trial Judge and did not reverse any of these findings as erroneous. Rather, it ruled that, although Petitioners had demonstrated a price fixing conspiracy, the availability of treble damages mandated a finding that Petitioners have an adequate remedy at law. The First Circuit then addressed the termination of the dealers and found it to be permissible vertical integration supported by the Journal's alleged claims of business efficiency. This conclusion was made without reversing the District Court's findings with respect to *per se* and Rule of Reason violations of Section 1 and the abuse of monopoly power and attempt to monopolize violations of Section 2. In short, the First Circuit held that vertical integration is legal, *per se*—certainly a novel position in antitrust case law.

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[8] For example, on April 20, 1979, Stephen Hamblett, a vice president of the Journal, prepared a report for Mr. O'Donnell, the Journal's senior vice president, with recommendations on the best organization for the Journal's circulation efforts. Concern with price pervades the document. The report, at page 3, lists ten requirements of a successful circulation sales service effort. The primary requirement listed is "Price Control." The report states: "(1) Price Control. We have been very successful in maintaining price through the power of suggestion. There is no guaranteeing that this honeymoon will continue. (Expo is now selling the Sunday Journal for $1 home delivered in North Attleboro)." Page 4 of the report indicates that the Journal was seeking a system under which it could "regulate the price and gain Price control." "[G]reater control...through the elimination of the independent distributor" is identified as "key" by Mr. Hamblett on page 2 of the report. The Board of Directors of the Journal was advised in a report entitled "Review of Circulation Distribution Organization and Planned Course of Action" in answer to a question, "What is wrong with the independent distribution system?", that independent distributors have interests of their own, most notably "Unilateral price increases" that did not meet the "goal congruence" insisted upon by the Journal. This report was reviewed less than a month before the notice of termination was sent to the distributors.

Petitioners filed a motion for rehearing and it was denied on October 22, 1981. Thereupon, Petitioners requested that issuance of the mandate of the Court of Appeals be stayed for 30 days to enable them to file a Petition for a Writ of Certiorari in this Court. On October 23, 1981 that request was granted. Copies of the orders denying rehearing and granting a stay of mandate are appended hereto at pages A-34 and A-35.

Reasons for Granting the Writ

A. Summary of Argument

The questions presented above present important issues central to the administration of the antitrust laws and the First Circuit's resolution thereof conflicts with both the applicable decisions of this Court and the decisions of other circuits.

Since the First Circuit did not hold any of the District Court's findings of fact to be erroneous, its ruling that vertical integration by the Journal does not violate the antitrust laws resolved highly disturbing and important legal issues of antitrust policy in a manner conflicting with their resolution by this Court and by the Court of Appeals for the Fifth and Sixth Circuits. Moreover, to the extent the First Circuit ruled that Petitioners would not suffer irreparable injury as a result of the termination of their family-owned distributorships due to the availability of treble damages, that ruling is in conflict with the position of the Second Circuit on the identical issue.

B. The Decision Below Conflicts With the Decisions of This Court With Regard to Vertical Integration, the Preservation of Monopoly Power and Price Fixing

The First Circuit's holding that, "In the specific context of the case before us, we cannot see how the kind of vertical integration at issue—integration into distribution—violates the

antitrust laws," (A-32; 659 F.2d at 278), squarely conflicts with this Court's holdings in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), and *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), which bar the use of monopolistic power with the intent to preserve a monopoly. In its decision below, the District court specifically found that because of their "impressive market shares," (A-17; 504 F. Supp. at 303), "Plaintiffs have shown evidence of the probable existence of monopoly power." (A-18; *Id.* at 303). The situation here, where the Journal is employing its monopoly power to eliminate a long standing distribution system in order to preclude expansion by rival newspapers and to preserve its control over resale price, is markedly similar to the practices banned in the above cases. *Kodak* held liable a monopolist that sought to vertically integrate forward and stopped selling at wholesale prices to those distributors who refused to sell their businesses. *Otter Tail Power* condemned the refusal of a utility having monopoly power in the wholesale power market to sell such power to municipalities who proposed to replace the utility in the retail market.

The District Court below also found that Petitioners had presented evidence which "would support a conclusion of price fixing," in that Respondents had used coercion to prevent them from raising the price of newspapers to their carriers. (A-10; 504 F. Supp. at 299). The First Circuit's decision would apparently permit a monopolist to terminate its distributors in order to salvage a price fixing scheme admittedly violative of Section 1 of the Sherman Act, see *Albrecht* v. *Herald Co.*, 390 U.S. 145, 153-54 (1968), and it should therefore be reviewed by this Court. As stated in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966),

> "The offense of monopoly under Sec. 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisi-

> tion or *maintenance of that power* as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident," 384 U.S. at 570-71, (emphasis added).

Since monopoly power is in itself the "power to control prices or exclude competition," *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956), termination to control price is termination seeking to maintain a monopoly. The form of vertical integration should not have been elevated over the substance of a monopolist's efforts to maintain control over price.

Significantly, the principal decision relied on by the First Circuit, *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), is misapplied in the context of the present case. *Columbia Steel* was an action brought by the government under Sections 1 and 2 of the Sherman Act to enjoin the proposed merger of United States Steel and Columbia Steel. Unlike the present case, there was no determination in the lower court that the defendants wielded monopoly power prior to the planned vertical integration. Largely because United States Steel did not have monopoly power, the merger was not enjoined. This Court, unlike the First Circuit, recognized how significant that difference is. In the sentence of its opinion immediately preceding the sentence relied on by the First Circuit, i.e., "that vertical integration, as such without more, cannot be held violative of the Sherman Act," (334 U.S. at 525) this Court compared the case before it to *United States* v. *Griffith*, 334 U.S. 100 (1948), as follows:

> "[A monopolist] usually does not violate §2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expand it by means of those restraints of trade which are cognizable under §1." 334 U.S. at 525 n.24, *citing* 334 U.S. at 106-107.

The Providence Journal is guilty of price fixing—conduct violative of Section 1. That conduct is precisely the "more" which condemns vertical integration by a monopolist. Petitioners respectfully submit that by ignoring the explicit limitation of this Court's holding with respect to vertical integration, the First Circuit's decision in this case is in conflict with this Court's decisions in *Columbia Steel* and *United States* v. *Griffith*.

The implication of the First Circuit's decision is that vertical integration is legal *per se*. However, according to the decisions of this Court, vertical integration pursuant to a combination or conspiracy is governed by the Rule of Reason. The elimination of competition, the raising of entry barriers and wrongful refusals to deal may constitute unreasonable restraint of trade under Section 1 of the Sherman Act. "Economic efficiency" is not of itself a defense, but is only one factor to consider. It should be viewed in the light of legislative policy as determined by the Court. The focal point of the antitrust laws has always been on the preservation of competition. Congress has repeated this attitude in post-Sherman Act legislation. See Sections 2, 3, 7 of the Clayton Act (15 U.S.C. §§13, 14, 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). The courts have emphasized competition. *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1946), *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1947), *United States* v. *Columbia Steel Co.* In *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), the Court said: "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible costs, an organization of industry in small units which can effectively compete with each other." *Id.* at 429.

In *United States* v. *Yellow Cab Co.*, which dealt with an integrated organization wherein the operating companies were required to purchase taxicabs exclusively from the manufacturing arm, it was said:

> "The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." 332 U.S. at 227.

Under *United States* v. *Paramount Pictures, Inc.*, "the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived or (2) the power it creates and the attendant purpose or intent." 334 U.S. at 174.

The integration in this case creates a double barrier to entry, namely to other newspapers and to potential independent distributors.

In addition to finding *per se* violations, the District Court applied a Rule of Reason analysis to the Journal's actions. The Trial Judge was cognizant of the anti-competitive effects of the termination of the independent distributors and weighed them against the valid business reasons asserted by the Journal. Under the applicable standards for preliminary injunction, he concluded that under a Rule of Reason analysis, the Defendants had violated Section 1 of the Sherman Act when they decided to vertically integrate. (A-12-15; 504 F. Supp. at 300-302). The First Circuit only addressed the Journal's alleged business reasons and ignored the anti-competitive consequences of the termination found by the Trial Judge. As such, the First Circuit's analysis discarded the Rule of Reason approach with its attendant weighing of various pro- and anti-competitive effects and adopted an unsound legal doctrine that vertical integration is *per se* legal regardless of its anti-competitive effects.

C. The Decision Below Conflicts With the Decisions of Other Circuits With Regard to Vertical Integration by Monopolists

The First Circuit's apparent sanctioning of the use of monopoly power to forestall expansion by other newspapers through elimination of the only independent distribution system in Rhode Island also conflicts with cases from other Circuits.

In *Paschall* v. *Kansas City Star*, 605 F.2d 403 (8th Cir. 1979), a monopolistic newspaper was preliminarily enjoined from vertically integrating by terminating its independent distributors. The matter was certified to the Eighth Circuit on an interlocutory basis and the Court vacated the certification as improvidently granted and remanded the case to be tried on the merits. Implicit in the Eighth Circuit's opinion is a recognition that an otherwise lawful termination for concededly valid business reasons, when done by a monopolist, can constitute a violation of Section 2 of the Sherman Act. This conclusion conflicts squarely with the decision of the First Circuit in the instant case. Both cases involve similar facts although Petitioners contend theirs is a stronger case than *Paschall* because in addition to the Section 2 issues, there is substantial evidence and significant findings concerning Section 1 violations.

In *Byars* v. *Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979), the Sixth Circuit ruled that where a regional distributor of periodicals having a monopoly in such distribution refused to deal with a local distributor because it desired to integrate vertically, the conduct would violate Section 2 of the Sherman Act "where integration increases first-level entry barriers so that potential competitors are stymied." 609 F.2d at 861. In *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), the Fifth Circuit ruled that the use of a manufacturing

monopoly to vertically integrate into distribution and to eliminate a competing distributor similarly violated Section 2. *See also Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.*, 365 F.2d 478, 483 (5th Cir. 1966); *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945).[3]

Here the District Court found that:

> "an anticompetitive effect might be caused by the elimination of Plaintiffs from this secondary market, for while out-of-state and other Rhode Island newspapers circulate throughout the State to only a minute degree, they possibly act as a competitive force since they are at least potential competitors. *See United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973). Thus other newspapers could be said to be 'waiting in the wings' thereby acting as a competitive check on the Journal. For example, if the Journal were to raise its price per copy or for advertising, these other papers might enter or expand their service of the market. The newspaper business, however, is a two-tier one: both publication and distribution of the product is required. Absent an independent distributor system, potential competitors would necessarily have to enter both markets simultaneously. *Thus, an anticompetitive effect of the elimination from the market of Plaintiffs would be the entrenchment of Defendants and the raising of barriers to entry facing potential competitors of Defendants.*" (A-13-14; 504 F. Supp. at 301, (emphasis added)).

Moreover, the District Court found that, in terminating Petitioners, "Defendants will possess a monopoly in the field of newspaper distribution" and further ruled:

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[3] Neither *Natty* v. *McClatchy Newspapers*, 590 F.2d 335 (9th Cir. 1979), nor *Knutson* v. *Daily Review Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), relied on by the First Circuit, concerned the practices of a monopolist.

> "even if Defendants' vertical integration were found not to be violative of § 1, it might nonetheless support a § 2 claim inasmuch as it would raise barriers to entry to some extent in the product market." (A- 18; 504 F. Supp. at 303).

D. The Decision Below Conflicts With the Decisions of Other Circuits With Regard to the Availability of Preliminary Injunctive Relief

To the extent it refers to the termination of Petitioners' dealerships, the First Circuit's ruling that they will not be irreparably injured because of the availability of treble damages squarely conflicts with the general rule and specifically conflicts with the rule established in the Second Circuit. At stake is the total elimination of Petitioners' family businesses. "Distribution of Journal Newspapers is the life blood (of Petitioners)," (A-4; 504 F. Supp. at 296). That a destroyed business can be valued is no basis for overturning an injunction. 11 Wright & Miller, *Federal Practice and Procedure:* Civil § 2948, (1973) states the rule thusly:

> "Injury to reputation or goodwill is not easily measurable in monetary terms, and so often is viewed as irreparable. Indeed when the potential economic loss is so great as to threaten the existence of the moving party's business, then an injunction may be granted, even though the amount of direct financial harm readily is ascertainable." *Id.* at pp. 439-40. (footnotes omitted).

Moreover, the Second Circuit holds that preliminary injunctive relief is particularly appropriate to remedy the termination of a franchise or distribution relationship because the relationship is difficult to restore and the loss of goodwill results in irreparable harm. *Jacobson & Co., Inc.* v. *Armstrong Cork*

Co., 548 F.2d 438 (2d Cir. 1977); *Interphoto Corp.* v. *Minolta Corp.*, 417 F.2d 621 (2d Cir. 1969). Where the distributor is a family business, the Second Circuit will grant preliminary injunctive relief to prevent termination despite the availability of money damages. Speaking for the Second Circuit, Judge Friendly ruled:

> "Of course, Semmes' past profits would afford a basis for calculating damages for wrongful termination, and no one doubts Ford's ability to respond. But the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award." *Semmes Motors, Inc.* v. *Ford Motor Company*, 429 F.2d 1197, 1205 (2d Cir. 1970).

E. The Decision Below Conflicts With the Decisions of Other Circuits With Regard to the Showing Needed for Issuance of a Preliminary Injunction

While it is recognized that the issuance of a Writ of Certiorari during the interlocutory phases of a case is not favored, Respondents submit that the issuance of the Writ here is necessary to resolve the conflict between the First and other Circuits as to the application of the standard used in deciding whether a preliminary injunction should issue.

While the District Court followed the correct standard applicable to the grant of a preliminary injunction, it did consider the alternative standards of other Circuits. The Court of Appeals held that it was error to apply the standards of the other circuits, articulated in the Second Circuit in *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied* 434 U.S. 1014 (1978), which

stated: "In this circuit, a preliminary injunction can be granted if Plaintiff shows irreparable injury, combined with either a probability of success on the merits, or a fair ground for litigation and a balance of the hardships in his favor." *Id.* at 94. This view of the requirements enables a moving party to obtain a preliminary injunction on the strength, when compelling, of the factors other than the showing of likelihood of success on the merits, so that other factors may counterbalance a lesser showing on that requirement.

The First Circuit felt that this was the improper legal standard and stated its position that in order to obtain a preliminary injunction, "the moving party must exhibit a likelihood of success on the merits," and none of the criteria can be slighted. (A-30; 659 F.2d at 277.) This conflicts with the trend begun by *Wainwright* and continued in *Semmes Motors, Inc.* v. *Ford Motor Company; Productos Carnic, S.A.* v. *Central American Beefland Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980); *Fox Valley Harvestore, Inc.* v. *A. O. Smith Harvestore Products, Inc.*, 545 F.2d 1096, 1098 (7th Cir. 1976); *Federal Leasing, Inc.* v. *Underwriters at Lloyd's*, 487 F. Supp. 1248, 1261 (D. Md. 1980); *Hawaii Psychiatric Society District Branch of American Psychiatric Association* v. *Ariyoshi*, 481 F. Supp. 1028, 1036 (D. Hawaii 1979).

That the First Circuit's position conflicts with the recent trend, and is especially inappropriate in those instances where the moving party is a distributor threatened with the loss of his business, was recently shown in *Menominee Rubber Co.* v. *Gould, Inc.*, 657 F.2d 164 (7th Cir. 1981). The Seventh Circuit affirmed the judgment granting a preliminary injunction on behalf of a distributor. "In cases seeking preliminary injunctions on antitrust grounds against termination of dealerships, those injunctions are frequently granted with a lesser showing of likelihood of success on the merits than would normally be required." *Id.* at 167. Termination causes irreparable harm and when coupled with the imbalance of hardships, the

Seventh Circuit saw fit in an antitrust case to hold that a lesser showing on probability of success is acceptable when granting a preliminary injunction. This is in accord with the trend in other Circuits and in district courts not only in termination cases, but other areas as well.

The District Court recognized this trend, which is particularly appropriate in termination cases, but the First Circuit held that the District Court, and therefore the Second, Seventh and other Circuits, have erred.

Petitioners respectfully submit that resolution of this conflict between the First and other Circuits is needed in regard to the alternative tests for obtaining a preliminary injunction.

F. Other Factors Which Support Granting of the Writ

Respondents submit that the issuance of the writ here will promote the interests of justice and avoid needless repetition and expense. First, were this Court to await the result of a trial on the merits, the conflict between the First and Second Circuits regarding the right to preliminary injunctive relief where a family business faces destruction would be unresolved. Second, if the antitrust issues are not resolved by this Court and the First Circuit adheres to its views on appeal from a trial on the merits, then a retrial will likely be necessary if those views are erroneous as Petitioners submit. Moreover, there is a substantial record in this case already developed during the seven days of hearing held on the motion for a preliminary injunction, and thus this Court will not be addressing these issues on the type of limited record often present at this stage.

Certiorari should also be granted because the issues presented here are "beyond the academic or episodic," *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955), and review of statutory issues rather than evidence is sought. See, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Here also there are important and clear-cut issues of law that are fundamental

to the further conduct of the case. The presence of such issues makes their review appropriate by Writ of Certiorari despite the interlocutory stage of the proceeding. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

Conclusion

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

AUBURN NEWS COMPANY, INC., *et al.*

By their attorneys,

Of Counsel:
AUSTIN T. STICKELLS
765 Commonwealth Ave.
Boston, MA 02215

FRANK LICHT, Esq.
RICHARD A. LICHT, Esq.
LETTS, QUINN & LICHT
1616 Hospital Trust Tower
Providence RI 02903

LEONARD DECOF, Esq.
DECOF & GRIMM
One Smith Hill
Providence, RI 02903

November 30, 1981

United States District Court
District of Rhode Island

AUBURN NEWS COMPANY, INC. ET AL.

v.

PROVIDENCE JOURNAL COMPANY ET AL.

Civ. A. No. 80-0446.

Nov. 14, 1980.

Frank Licht, Richard A. Licht, Letts, Quinn & Licht, and *Leonard DeCof,* Providence, R.I. for the plaintiffs.

Edward F. Hindle, Joseph Cavanagh, Jr., Edwards & Angell, Providence, R.I., *Daniel C. Kaufman, King & Ballow,* Nashville, Tenn., for defendants.

OPINION

FRANCIS J. BOYLE, *District Judge.*

This action concerns alleged violation of Sections One and Two of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1976), alleged violation of the analogous Rhode Island Antitrust statutes, R.I. Gen Laws § 6-36-1, *et seq.* (Supp. 1980), as well as an alleged breach of the common law duty not to wrongfully interfere with contractual relationships. The Plaintiffs seek a Preliminary Injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

THE PARTIES

Plaintiffs are eighteen independent distributors who purchase at wholesale Defendants' newspapers and a much smaller number of out-of-town newspapers and distribute those newspapers by direct sale or through home delivery carriers in precisely delineated areas whose boundaries are strictly observed. Defendant, The Providence Journal Company (hereinafter, the Journal), is the publisher of *The Providence Journal, The Evening Bulletin, The Providence Journal-Bulletin,* and *The Providence Sunday Journal.* These newspapers circulate throughout Rhode Island and in parts of Southeastern Massachusetts. *The Providence Journal* is the only morning newspaper published and sold in Rhode Island.

The Providence Journal-Bulletin is the only Saturday morning newspaper published and sold in Rhode Island. *The Providence Sunday Journal* is the only Sunday morning newspaper published and sold in Rhode Island. Only *The Evening Bulletin* is subject to direct competition from other Rhode Island local newspapers.

FACTUAL BACKGROUND

For many years the Journal distributed its newspapers by selling to distributors who in turn sold to stores and home delivery carriers. Through the years the boundaries of each distribution area crystalized. In essence, the market for sale of the Journal's papers was divided into distributorships. There is testimony to indicate the territorial division was maintained not by any coercion of the Plaintiffs or Defendants, but by a mutual understanding that it was the most efficient and effective way to conduct business.

In 1973 the Journal decided to attempt to acquire some of these independent distributorships and distribute its newspapers itself. In furtherance of this goal Southern New England News Distributors, Inc. (hereinafter Southern New England) was formed. Southern New England was a wholly owned subsidiary of the Journal.

In March, 1973, a meeting of independent distributors was called by Mr. Koehler, the Journal's circulation director. Mr. Koehler and the independent distibutors met at a country club for breakfast. The purpose of the meeting was to announce a change in the Journal's policy. From that point on, the Journal would not recognize distributorships sold to anyone other than Southern New England. The Journal would buy the distributorships at "fantastic" prices, starting at a 100% increase over the cost and going "all the way to 800-900% and/or over." In effect, the Journal would not sell its product to any news distributors. When one of the distributors asked if he would be permitted to sell his business to a son or daughter, the Journal spokesman stated that a sale to a member of a distributor's immediate family would be proper.

The apparent rigidity of the Journal's new policy was not always followed. Following the beakfast meeting, some distributorships were sold to persons who were not members of the immediate family of a distributor.

Sometime in late 1979 or early 1980, the Journal decided to step up its plan for in-house distribution of its newspapers. There is evidence that the Journal's decision was based on a number of business reasons including: the ability to control price; the ability to obtain detailed information on subscribers and nonsubscribers; direct access to the carrier or store owner; and the ability to improve market penetration. Further, the Journal had outside management consultants' advice.

On the other hand, there is evidence of a different scenario. Plaintiffs point to evidence which indicates the studies and reports of the Journal succeeded the decision to distribute directly, that the studies and reports were generated thereafter only to provide a basis for arguing the decision to go in-house was founded on sound business reasons and not anti-competitive intent.

In a letter dated August 11, 1980, the Journal informed all distributors that as of September 6, 1980, the Journal would no longer sell its newspapers at wholesale rates to independent distributors. The letter went on to invite the distributors to discuss a price for their distributorship with the Journal. Of the thirty-two independent disributors at the time of the August 11 letter, fourteen sold to the Journal. Plaintiffs are those distributors who did not sell. The Journal also published in its newspapers advertisements notifying home delivery carriers, including those who purchased from Plaintiffs, that they "must" contact the Journal if they wished to continue delivering the Journal's papers.

On September 5, 1980, this Court issued a Temporary Restraining Order, pursuant to Fed.R.Civ.P. 65(b), in effect compelling the Journal to continue to sell to the Plaintiffs. On September 24, 1980, a hearing began on the issue of whether a

preliminary injunction should issue. Seven days of testimony followed and the issues were extensively briefed.

PRELIMINARY INJUNCTION

The decision to issue a preliminary injunction tradionally rests upon an examination of four factors: 1) the likelihood Plaintiffs will suffer irreparable harm; 2) the balance of this harm with the harm Defendants will suffer if they are enjoined; 3) the probability Plaintiffs will succeed on the merits; and 4) the public's interest in issuing an injunction. *See* Wright & Miller, *Federal Practice & Procedure: Civil* § 2948 (1973).

IRREPARABLE HARM

Plaintiffs claim they will suffer irreparable harm if the Journal is permitted to refuse to deal with them in that they will be forced out of business. The Journal argues that even if wrongdoing is ultimately found, money damages, easily determined, with a provision for treble damages in an antitrust action, provide an adquate remedy at law, removing the need for, and indeed requiring the denial of any interlocutory relief.

Distribution of Journal newspapers is the life blood of these Plaintiffs.[1] The uncontradicted testimony is that the Plainiffs' businesses will fold without the opportunity to distribute the Journal's papers. Indeed, the evidence is that the Journal required the independent distributors to devote full time to their businesses. Defendants themselves recognized the significance of the Journal's papers to Plaintiffs: distribution of the Journal's papers was a full time job.

Defendants argue, however, that there is an adequate remedy at law, namely money damages. Defendants point to the sale price of the distributorships as the easily determined measure of damages and argue that three times that amount is clearly an adquate remedy. The argument proves too much.

Theoretically, this argument has an apparent validity. Should Plaintiffs recover upon their theory for violation of the

[1] While the other papers are distributed by some of these independent distributors, it can be said their contribution to the total is *de minimis*.

Sherman Act, they would be entitled not only to recover actual damages but three times their actual damage. 15 U.S.C. § 15 (1976). There are a number of real impediments to a translation of this theory into fact. Since Defendants intend to assume Plaintiffs' businesses of newspaper distribution, the real result would be that Defendants have purchased Plaintiff's businesses, at a price determined by the Court. This result would have the effect of converting this action into a kind of private eminent domain proceeding not sanctioned by either constitutional or statutory authority.

There is also an effect upon others who are not parties to this action. At the present time Plaintiffs supply those large numbers of newspaper carriers and stores who sell Defendants' goods directly to the consumer. Although there are no written contracts with Plaintiffs, there is a natural reliance by those newspaper carriers and stores who distribute Defendant Journal's newspapers to the ultimate consumer upon the ability of the Plaintiffs to provide them with newspapers for sale. Plaintiffs have acquired or created and maintain a system of distribution involving hundreds of people, including many enterprising and hard working entrepreneurs between the ages of twelve and seventeen. Any disruption of supply would effectively terminate those businesses as effectively as it will terminate Plaintiffs' businesses. Any expectation that those relationships could be succesfully resumed, after a hiatus, is not within the realm of reality. Defendants have actively solicited Plaintiffs carriers to form a direct relationship with Defendants. An attempt to resuscitate these independent distributor-carrier business relationships while Defendant Journal is the sole source of supply would be a hope doomed to fail.

There is a further factor. Although compensation for damages to parties injured by a violation of the Sherman Act may provide a substitute for the interest of those parties, damages cannot restore competition, and, in a sense, damages merely serve to thwart the lofty purpose of the Sherman Act. This is not to say that every alleged violation of the Sherman

Act necessarily requires equitable relief, but preserving the existence of competitive forces it is a fact which in balance, must be given some deference.

Thus, Defendants fail to recognize the elimination of one's livelihood, the extinguishment of an entrepreneur's spirit and the disruption of existing business relationships cannot be measured by money alone. *Engine Specialists, Inc.* v. *Bombardier Ltd.*, 454 F.2d 527 (1st Cir. 1972); *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F.2d 1197, 1205-06 (2d Cir. 1970); *Paschall* v. *Kansas City Star Co.*, 441 F.Supp 349, 356-57 (W.D.Mo.1977).

COMPARATIVE HARM

The Court must balance the harm to be suffered by defendants, should an injunction issue, and the harm to be suffered by Plaintiffs should it not issue. We begin with an observation: The Journal has operated with a system of independent distributors for a number of years. An injunction *pendente lite* would merely maintain the status quo until there is a full hearing on the merits. Thus, when balanced against the potential harm to be suffered by Plaintiffs, Defendants' argument pales. Moreover, there is evidence indicating Defendants would only gradually adopt its desired plan of distribution, that is the change over would take a number of months to complete. The Court concludes Plaintiffs possess a greater risk of harm.

THE PUBLIC INTEREST

That the public's interest is furthered by the prevention of a violation of the antitrust statutes is beyond dispute. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.* 395 U.S 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969).

PLAINTIFFS' PROBABILITY OF SUCCESS

That the issuance of a prohibitory injunction is a drastic remedy is also beyond dispute. Consequently, equity has traditionally required the moving party to demonstrate at a preliminary hearing that it will probably succeed at a trial on the merits. There is astoundingly little authority which discusses precisely the implications of this standard.

The trend in more recent decisions is to adopt the alternative test articulated first in the Second Circuit. *See, e.g., United States* v. *Bedford Associates*, 618 F.2d 904 (2d Cir. 1980); *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed2d 759 (1978). The standard of this line of decisions is as follows: where other factors—such as the potential for harm to be suffered by plaintiff and the lack of a similar potential harm for defendant—are strong, the plaintiff need not make as persuasive a showing that he is likely to succeed on the merits. *Productos Carnic, S. A.* v. *Central American Beefland Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980); *accord, Fox Valley Harvestore, Inc.* v. *A.O. Smith Harvestore Products, Inc.*, 545 F.2d 1096, 1098 (7th Cir. 1976); *Federal Leasing, Inc.* v. *Underwriters at Lloyd's*, 487 F.Supp. 1248, 1261 (D.Md. 1980); *Hawaii Psychiatric Society District Branch of American Psychiatric Association* v. *Ariyoshi*, 481 F.Supp. 1028, 1036 (D.Hawaii 1979).

The First Circuit has indicated approval of a balancing approach to the question of ultimate success on the merits. *National Tank Truck Carriers, Inc.* v. *Burke*, 608 F.2d 819, 823 (1st Cir. 1979); *Tuxworth* v. *Froehlke*, 449 F.2d 763, 764 (1st Cir. 1971). This Court has squarely addressed the issue:

> [i]f the balance of hardships tips decidedly toward the plaintiff, it is ordinarily suficient that the plaintiff has raised questions going to the merits which are so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus, for more deliberate investigation.

Silva v. *East Providence Housing Authority*, 390 F.Supp. 691, 696 (D.R.I. 1975) (quoting *Palmigiano* v. *Travisono*, 317 F.Supp. 776, 787-88 (D.R.I. 1970) (Pettine, J.)).

This approach makes eminent good sense in view of the fact that, strictly speaking, requiring Plaintiffs to meet the "probability of success" standard virtually precludes a contrary fact finding upon hearing on the merits. The need to preserve

the status quo is obvious if, absent relief, the controversy is likely to become moot pending a hearing on the merits as clearly appears to be the fact in this action. The analysis of the facts and applicable law which follows establishes that Plaintiffs are entitled to the temporary relief which they seek based upon evidence which is believable, acknowledging at the same time the existence of contrary evidence and without at the same time any prejudgment of the facts as they might be ultimately found at a hearing on the merits.

SECTION I CLAIMS

Plaintiffs charge Defendants with various violations of Section One of the Sherman Act which prohibits contracts, combinations and conspiracies in restraint of trade. 15 U.S.C. § 1 (1976). Plaintiffs allege the Journal and Southern New England combined to coerce Plaintiffs to maintain Defendant Journal's suggested retail price and that the acquisition of the fourteen independent distributors was in furtherance of this retail price maintenance scheme. Plantiffs further allege Defendants established an illegal concerted refusal to deal when a decision was made to vertically integrate downstream, *i.e.* when the Journal decided to enter, develop and ultimately envelop the secondary market of newspaper distribution. If established, these claims would amount to *per se* violations of the Sherman Act. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *Klor's* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

With respect to the allegation of group boycott or concerted refusal to deal, Defendants first claim the Journal and Southern New England are incapable of the type of concerted activity forbidden by the antitrust laws. Defendants, while acknowledging their refusal to deal with Plaintiffs, assert the decision was a unilateral one involving no combination. Finally, Defendants claim that even if some sort of concerted activity is determined to exist or to have existed, such activity

concerned a vertical arrangement and not a horizontal one thereby shielding the agreement from the harshness of *per se* analysis.

With reference to the retail price maintenance charge, Defendants argue first that they did not attempt to maintain price, but even if there were some incidents of price maintenance in the past, they would not be grounds for enjoining or compelling divestment in an otherwise proper vertical integratio[illegible]

Southern New England is the distribution arm of the Journal. Southern New England has always been a wholly owned subsidiary of the Journal. Defendants point to these facts and assert their inability to combine in violation of § 1. Mere common ownership will not insulate entities from the reach of the Sherman Act. *United States* v. *Citizens Southern National Bank*, 422 U.S. 86, 116, 95 S.Ct. 2099, 2116, 45 L.Ed.2d 41 (1975); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed 219 (1951); *United States* v. *Yellow Cab Co.* 332 U.S. 218, 227, 67 S.Ct 1560, 1565, 91 L.Ed. 2010 (1947). Further, the existence of a parent subsidiary relationship between the two entities by itself has little antitrust significance. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 282 (1968); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951). While it may well be that a corporate division cannot conspire with another division as an employee may not conspire with employer, *Nelson Radio and Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (1953); *Lamarca* v. *Miami Herald Publishing Co.*, 395 F.Supp. 324 (S.D.Fla.), *aff'd* 524 F.2d 1230 (5th Cir. 1975),[8] separate incorporation is another matter. The very

[8] Defendants point to *Lamarca* and *Millcarek* v. *Miami Publishing Co.*, 388 F.Supp. 1002 (S.D. Fla. 1975) in support of their claim that they cannot conspire among one another. *Lamarca* and *Millcarek* involved an employee-employer relationship. The case at bar concerns independent contractors. *Lamarca* and *Millcarek*, therefore, are inapposite.

purpose of incorporating a subsidiary is to memorialize a degree of separateness between the two entities. This is done for a number of reasons. For example, the Journal stated it was concerned with the threat of unionization of its distribution employees. The Journal's reasons for separately incorporating Southern New England are beside the point; the point is that at the instant Southern New England was incorporated, it had a separate legal existence.[3] It is, therefore, quite possible to find that the Journal and Southern New England conspired or combined with one another in contravention of § 1.[4]

Plaintiffs allege the existence of a combination the purpose of which was the maintenance of a Journal-determined maximum resale price. Plaintiffs claim the Journal combined with Southern New England as well as with the independent distributors themselves in furtherance of this price fixing scheme. For purposes of analysis, it is best to consider this allegation as it applies to separate time periods: before and after the August 11, 1980 termination letter.

DEFENDANTS' CONDUCT BEFORE THE LETTER

Relying on *Albrecht* v. *Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968) and applications of that opinion, Plaintiffs allege a combination between Defendants and between Defendants and the independent distributors to fix price.

Evidence was presented which, if believed by the ultimate finder of fact, would support a conclusion of price fixing. Mr. Proulx, the independent distributor in the Bristol, Rhode Island area testified that Journal's approval of him as franchisee was at least tacitly conditioned on his respect of the Journal's suggested retail price. When Mr. Proulx later raised

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[3] Indeed, there was evidence that at certain times the Journal and Southern New England were at cross purposes.

[4] *Knutson* v. *Daily Review, Inc.* 383 F.Supp. 1346 (N.D.Cal. 1974), *aff'd in part rev'd in part on other grounds*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977), upon which Defendants rely is not to the contrary. There the court found two newspapers to be mere extensions of a sole owner. That court further held there had been no proof of monopoly power, nor of coercive or predatory practices.

the price of the papers to his carriers, he claims to have suffered late deliveries from the Journal. Plaintiff Brooks stated when she informed Mr. O'Neil of the Journal that due to increased costs of distribution she needed to raise her price for the papers, she was told she could not. Other Plaintiffs testified to similar occurrences.

The effect of such activity on the part of the Journal could only be coercive. Plaintiffs were organized and what was suffered by one distributor could be expected to be communicated to all distributors. The direct and natural result of such activity was communication to the independent distributors that if they did not comply with the Journal's wishes, disastrous repercussions would ensue. *Newberry* v. *Washington Post Co.*, 438 F.Supp. 470, 480-82 (D.D.C. 1977).

With the communication of this policy, cooperation followed. With few exceptions, the price suggested by the Journal was the price charged by the independent distributors and the home delivery carriers. Consequently, under this theory a combination in violation of § 1 can be established: When the distributors acquiesced to the wishes of the Journal, the combination was formed. *Albrecht*, 390 U.S. at 150 n.6, 88 S.Ct. at 872 n.6.[8]

In addition to the Plaintiffs themselves, it is quite possible to find that Southern New England combined with the Journal to coerce Plaintiffs with maintaining the Journal's price schedule. In 1973 Southern New England was formed. Its avowed purpose was to acquire distributorships from those who wished to sell. Undoubtedly an effect of its formation was to place Plaintiffs on notice that the Journal was quite capable of distributing its papers should any of the Plaintiffs fall in disfavor.

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[8] Defendants' reliance on *Naify* v. *McClatchy Newspapers*, 599 F.2d 335 (9th Cir. 1979) and *Newberry* v. *Washington Post Co.*, 438 F.Supp. 470 (D.D.C. 1977) is misapplied. In *Naify* there was no evidence of any attempt to maintain retail prices. Similarly in *Newberry*, with the exception of one instance, there was no evidence of coercion. Thus a combination could not be found.

DEFENDANTS' CONDUCT AFTER THE AUGUST 11, 1980, LETTER

Demonstrating a post termination price fix seems a more difficult task for Plaintiffs. For the same reasons, it appears less likely that Plaintiffs will be able to demonstrate defendants' conduct was a *per se* violation of § 1 in the form of a concerted refusal to deal by Southern New England and the Journal.

First, the arrangement between Defendants is to be distinguished from the ordinary § 1 combination. Defendants represent a vertically integrated whole. As such, the decision not to sell to Plaintiffs but instead to sell only to Southern New England is best analyzed as an exclusive dealership rather than a group boycott. *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2nd Cir.) (en banc), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978); *See* Case Note, *Vertical Agreement to Terminate Competing Distributors*, 92 Harv.L.Rev. 1160 (1979).

The distinction is significant for while both arrangements may be anti-competitive, group boycotts are subjected to the rigors of *per se* analysis while exclusive dealerships are to be reviewed acording to the more forgiving standards of the Rule of Reason. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38 (1957).

The reason for the distinction is clear. Group boycotts involve horizontal agreements. For the vast majority of situations they further no competitive activity while at the same time stifling competitive forces of the market place. On the other hand exclusive dealerships and vertical arrangements in general, often are competitive in effect. Further, such competitive effects often offset any anti-competitive effects. *See e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* 433 U.S. 36,97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (exclusive territory arrangement whose competitive effect was the promotion of inter-brand competition and whose anti-competitive effect

was the stifling of intra-brand competition was found reasonable). Thus, vertical arrangements justify the use of the Rule of Reason.

The Rule of Reason means that in determining whether there is an antitrust violation, a balancing must be performed; pro-competitive effects must be compared with anti-competitive effects. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). Plaintiffs argue, and the evidence indicates, that vertical integration will necessarily be the undoing of their businesses. The antitrust laws, however, protect competition, not competitors. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*,429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962). Therefore , if the elimination of competitors from the market place is to have an anti-competitive effect their presence must be shown to have a pro-competitive effect. Plaintiffs concede thay do not compete among themselves. Thus for the most part there is no competition in the secondary newspaper distribution market. Nonetheless, an anti-competitive effect might be caused by the elimination of Plaintiffs from this secondary market, for while out-of-state and other Rhode Island newspapers circulate throughout the State to only a minute degree, they possibly act as a competitive force since they are at least potential competitors. *See United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 93 S.Ct.1036, 35 L.Ed.2d 475 (1973). Thus other newspapers could be said to be "waiting in the wings" thereby acting as a competitive check on the Journal. For example, if the Journal were to raise its price per copy or for advertising, these other papers might enter or expand their service of the market. The newspaper business, however, is a two-tier one: both publication and distribution of the product is required. Absent an independent distribution system, potential competitors would necessarily have to enter both markets simultaneously. Thus, an anti-competitive effect of the elimination from the

market of Plaintiffs would be the entrenchment of Defendants and the raising of barriers to entry facing potential competitors of Defendants. *See*, Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv.L.Rev. 1720, 1725-32 (1974); *cf. Hardin* v. *Houston Chronicle Pub. Co.*, 434 F.Supp. 54 (S.D.Tex.1977), *aff'd*, 572 F.2d 1106 (5th Cir. 1978) (no showing of monopoly power, coercion or anti-competitive effect).

Defendants on the other hand assert certain sound business reasons for their decision. One of Defendants' experts testified that newspapers derive the greatest proportion of their revenue from advertising. Advertising rates in turn are determined by circulation: the paper with the greater circulation will be able to command the better price for ads run in its paper. Various Journal witnesses testified that the goal of Defendants — to maximize circulation — was often at odds with Plaintiffs' objective to maximize profit on the sale of papers. Defendants argue that there are potential subscribers in rural parts of the market whom Plaintiffs are unwilling to service because the cost of delivering to these outlanders is too dear. Plaintiffs agree. Defendants further argue it would service these potential purchasers and that the marginal cost of such service would be justified by an increase in ad revenues due to the increase in circulation base. Plaintiffs agree. Plaintiffs, however, do not agree with Defendants' resolution of the tension caused by the apparent cross purposes of the parties. Defendants advocate, of course, vertical integration of the distribution system. Plaintiffs on the other hand believe an increase in their delivery cost allowance would be more appropriate.* Defendants' proposed solution yields the elimination of the independent distributors from the market place. Plaintiffs' does not.

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* Defendants underwrite part of the cost of delivery for distributors whose area is rural.

Defendants also point to their new customers service system. This system will allow subscribers of the Journal to call the Defendants directly with any question concerning its newspapers, while at the same time allowing the Journal to keep more accurate data on its subscribers. While centralization may have its advantages, this system would mean a subscriber would call not the local distributor possibly located in the same town, but rather to a centralized, perhaps distant point. Further, the evidence did not indicate that the independent distributors could not be incorporated into this new program.

In sum, it appears Plaintiff might well prove, under Rule of Reason analysis, Defendants violated § 1 when they decided to vertically integrate.

SECTION 2

Plaintiffs allege Defendants monopolized the newspaper business and attempted to monopolize the newspaper delivery business in Rhode Island and by doing so violated § 2 of the Sherman Act. Monopoly does not occur in a vacuum. The first step, therefore, is a definition of the relevant product and geographic markets.

PRODUCT MARKET

Plaintiffs assert Defendants produce a number of unique products: the only Sunday morning paper published in and distributed throughout the State, the only Rhode Island weekday and Saturday morning papers published in and distributed throughout the State, and the only Rhode Island evening weekday paper published in and distributed throughout the State. Only the evening weekday (Monday to Friday) paper is subject to direct competition from other locally published newspapers. In sum, Plaintiffs claim Defendants have a monopoly for the product market comprised of general circulation newspapers in the State.

Defendants view the situation from a somewhat different perspective. The thrust of their argument is that newspapers

are best understood as a vehicle for advertisement rather than a commodity for sale. Defendants argue the Journal's products are by no means unique for they must compete with all other media for ad revenues. Defendants argue the other media must be considered in defining the product market.

When one gets down to brass tacks, or any other specific product, almost all products have substitutes: even buses, skywriters and road signs compete with newspapers for advertising. Antitrust law, however, is only concerned with products reasonably interchangeable with one another, in other words, products for which there is some cross elasticity of demand. *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). So while buses, skywriters, road signs and newspapers may be in the same broad product market, it may well be that antitrust law is concerned only with the more narrow submarket of newspapers.

> The boundaries of such submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. at 325, 82 S.Ct. at 1523.

Traditionally, newspapers have been considered separate from other media. *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951). Plaintiffs argue the relevant product submarket may be further narrowed to include only newspapers of general circulation. This may be so. Evidence presented and testimony given indicates other Rhode Island newspapers are more parochial in nature, *i.e.*, they are oriented more toward reporting local events.

The proper product submarket might be limited to newspapers of general circulation published in Rhode Island,

i.e., the Journal's newspapers alone. As one of Plaintiffs' experts testified, the Journal's newspapers were "unique" in the extent of coverage of Providence news, state news and other features.

GEOGRAPHIC MARKET

The relevant geographic market is that area to which Plaintiffs can practically turn for the product. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 627, 5 L.Ed.2d 580 (1961). Plaintiffs state the relevant geographic market to be Rhode Island. Considering the necessity for prompt delivery of newspapers and the need to provide information concerning local events it would not seem practicable for distributors to look to Boston or New York for their product. The evidence was that the geographic market is the State of Rhode Island.

MONOPOLY POWER IN THE RELEVANT MARKETS

Evidence was presented indicating there was a relatively low level of cross elasticity between the retail price of the Journal newspapers and the demand for suburban dailies.[7] In other words, as the price of the Journal's newspapers increased, demand for other suburban dailies did not increase but remained relatively the same.

An additional inference of monopoly power can be made from an overwhelming market share. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). The Journal's market share is remarkably impressive. If the product market is limited to newspapers of general circulation, *i.e.*, the Journal's newspapers and out-of-town dailies, the Journal's share might be approximately ninety percent. Including all Rhode Island dailies, the percentage is not less than sixty-five percent.

Defendants data again speak from a different perspective. Its figures concern "household penetration," *i.e.*, the percentage of Rhode Island households which receive its newspapers.

[7] No testimony was offered concerning the cross elasticity between the Journal's newspapers and the out-of-state dailies.

The range is from a low of twenty percent for *The Providence Journal* to a high of sixty-two percent for *The Providence Sunday Journal*. While these figures are less than those usually held to establish monopoly power, *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), Plaintiffs observe that these figures measure not Defendants' share of the newspaper-buying public but include the entire public at large. Market share should not be measured by absolute population figures, but should reflect the number of those who demonstrate an actual or potential interest in the market in which the competition is measured.

The Court concludes Plaintiffs have shown evidence of the probable existence of monopoly power.

MONOPOLIZATION

Monopolization in contravention of § 2 occurs whenever one with monopoly power commits an unreasonable restraint of trade in violation of § 1. *United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 295, 342 (D.Mass.1953), *aff'd*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). As stated earlier, there is credible evidence indicating Defendants violated § 1 under both *per se* and Rule of Reason analysis.

In *United Shoe* Judge Wyzanski also discussed another analysis by which a § 2 violation could be found: monopoly power plus exclusionary practices. *Id.* at 342. Such exclusionary practices would be evidence of willful maintenance of monopoly power. Such exclusionary practices need not rise to the level of a § 1 violation. Therefore, even if Defendants' vertical integration were found not to be violative of § 1, it might nonetheless support a § 2 claim inasmuch as it would raise barriers to entry to some extent in the product market. See discussion at 300-301, *supra*. *United States* v. *Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948); *see also FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 578, 87 S.Ct. 1224, 1230, 18 L.Ed.2d 303 (1966); *Byars* v. *Bluff City News Co., Inc.*, 609 F.2d 843, 859-64 (6th Cir. 1980).

ATTEMPT TO MONOPOLIZE

Plaintiffs further allege Defendants are attempting to monopolize the secondary distribution market. This too would be a violation of § 2. The standard employed in these cases is whether there is a specific intent to monopolize as well as a dangerous probability of success. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 154-55, 72 S.Ct. 181, 186-87, 96 L.Ed. 162 (1951); *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 180 F.Supp. 125, 140 (D.Mass.) *aff'd in part, rev'd in part*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833, 81 S.Ct. 747, 5 L.Ed.2d 744 (1961). Specific intent to monopolize however, can be inferred when the natural outcome of Defendants' actions is the elimination of competition. *Lorain Journal*, 342 U.S. at 154, 72 S.Ct. at 186; *United States* v. *Griffith*, 334 U.S. 100, 105, 68 S.Ct. 941, 944, 92 L.Ed. 1236 (1948). It appears the natural result of Defendants' vertical integration would be the elimination of potential competition of distributors *inter se*.[6] Further, such an integration would eliminate potential competition between Southern New England and the independents.

Without a doubt, if the integration is completed, Defendants will possess a monopoly in the field of newspaper distribution. Thus it appears Plaintiffs might well demonstrate an attempt to monopolize the secondary market. Plaintiffs allegation of attempted monopolization is further bolstered. The case at bar involves two vertically related markets: the publication and distribution of newspapers in Rhode Island. Plaintiffs allege Defendant Journal is using its position of dominance in the primary market to achieve dominance in the secondary market. A leading case in this area of antitrust law involving two vertically related markets is *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d

[6] The testimony indicates there is practically no competition among distributors. For obvious reasons maintenance of such a condition was never an express condition of either the relationships among distributors or between distributors and the Journal.

359 (1973). In that case defendant was an electrical utility company and a monopolist with respect to power transmission. After a number of years of supplying power at the retail level, Otter Tail was informed by a number of municipalities that it would be needed only for wholesale purposes and that the municipalities would serve as retailers. Otter Tail refused to sell to the municipalities.[9] The Court found Otter Tail attempted to monopolize the secondary market when it refused to deal with the municipalities. The facts of *Otter Tail* could be found to be similar with those of in this action. Thus it appears Plaintiffs might well demonstrate a § 2 violation by Defendants' attempt to monopolize.

STATE LAW CLAIMS

1. Antitrust Allegations

Rhode Island law incorporates interpretations of the federal antitrust statutes. R.I.Gen.Laws § 6-36-2(c) (Supp. 1980). Consequently, the potential for proof of a violation of Rhode Island law is the same as that for a violation of §§ 1 and 2 of the Sherman Act 15 U.S.C. §§ 1, 2. No further discussion is necessary.

2. Tortious Interference with Business Relations.

Plaintiffs also seek to prevent Defendants from using Plaintiffs' customer lists. That customer lists are a property right to be protected from misappropriation is beyond dispute. *Colonial Laundries, Inc.* v. *Henry*, 48 R.I. 332, 138 A. 47 (1927). The rationale behind such protection is the likelihood that absent interference, "route customers will continue to patronize the same supplier...." *Go-Van Consolidators, Inc.* v. *Piggy Back Shippers*, 111 R.I. 697, 699, 306 A.2d 164, 165 (1973). Not all customer lists, therefore, are to be protected but only those of a confidential nature, *i.e.*, those which are comprised of customers

[9] Otter Tail also refused to "wheel" power to Plaintiffs, that is, it refused to transmit to Plaintiffs power generated by others, and engaged in harassing litigation.

> whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a part of the good-will of a business which enterprise and foresight have built up....

Callahan v. *R. I. Oil Co.*, 103 R.I. 656, 660, 240 A.2d 411, 413 (1968), (quoting *Town & Country House & Home Service, Inc.* v. *Newberry*, 3 N.Y.2d 554, 558, 147 N.E.2d 724, 726, 170 N.Y.S.2d 328, 331 (1958)).

The credible testimony reveals that Plaintiffs' customer lists could be found to be protected lists. Over the years distributors nurtured and cultivated their customers whose names comprised the lists. Further, when distributorships were sold, the customer lists were a significant element of the purchases. Indeed, Defendants' contract to purchase distributorships from willing parties evidence a recognition of the Sellers' proprietary interest in its list.

CONCLUSION

Plaintiffs have demonstrated adequate grounds for the issuance of a Preliminary Injunction. They have established that they will suffer irreparable harm if Defendants are not enjoined, the balance of harm tips in direction of the Plaintiffs, they have established a public interest which requires preliminary relief, and they have produced credible evidence which upon hearing of the merits, if accepted, will result in their ultimate success. If relief were not now granted, Plaintiffs claim to remain in business would be essentially moot. These circumstances warrant a preliminary injunction. Whether or not Plaintiffs will prevail is to be determined after a full opportunity for discovery and a full exposition of the facts. Accordingly, Defendants are enjoined from refusing to deal with Plaintiffs and from using Plaintiffs' customer lists pending a hearing on the merits of this action.

Plaintiffs shall prepare and present a form of Order in accord with this Opinion.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 80-0446

AUBURN NEWS COMPANY, INC., ET AL.

v.

PROVIDENCE JOURNAL COMPANY, ET AL.

ORDER

This action came on for hearing on Plaintiffs' prayer for a preliminary injunction before the Court, Judge Boyle presiding, and based on the documentary and testimonial evidence introduced at seven days of trial and the arguments and authorities extensively presented in various memoranda of the parties, the Court rendered an opinion dated November 14, 1980 whereby the Court fully set forth its findings of fact and conclusions of law, which opinion is incorporated herein by reference. As set forth therein, the Court has determined that the Plaintiffs have demonstrated adequate grounds for the issuance of a preliminary injunction. The Defendants subsequently sought an order pursuant to R.C.P. 65(c) establishing security as a condition to the entry of the preliminary injunction. The matter was submitted to the Court on memoranda and affidavits. The Court determined the amount of security which is proper in a Memorandum dated December 18, 1980, which memorandum is incorporated herein by reference.

The Court has found and concluded, *inter alia*, the following:

1. The Plaintiffs will suffer irreparable harm if a preliminary injunction is not granted.

2. The balance of harm tips in direction of the Plaintiffs.

3. The Plaintiffs have established a public interest which requires preliminary relief.

4. The Plaintiffs have produced credible evidence which upon hearing of the merits, if accepted, will result in their ultimate success in showing defendants have violated Section 1

and 2 of the Sherman Act, the Rhode Island Anti-trust Act and the common law through tortious interference with Plaintiffs' business relationships by a misappropriation of Plaintiffs' customer lists and carrier network.

WHEREBY, it is ORDERED that:

(1) Pending a determination of this action, the Defendants, their officers, agents, servants, employees and all persons in concert or participation with them, be, and hereby are enjoined from refusing to deal with Plaintiffs and from using Plaintiffs' customer lists.

(2) In addition to the bond in the amount of $3,200 previously furnished by Plaintiffs, the Plaintiffs shall furnish a bond without surety in the amount of $30,000 as proper security for the payment of such costs and damages as may be incurred by either of the defendants in the event it is found that either has been wrongfully enjoined.

ENTERED this day of December, 1980.

BY ORDER:
(s) ROBERT R. HENRY
Deputy Clerk

ENTER:
(s) FRANCIS J. BOYLE
FRANCIS J. BOYLE
United States District Judge
Dec. 23, 1980

CERTIFICATION

I hereby certify that I hand delivered a copy of the within Order to Edward Hindle, Esq. and Joseph V. Cavanaugh, Jr., Esq., attorneys for defendants, 2700 Hospital Trust Tower, Providence, Rhode Island 02903, on the 19th day of December, 1980.

(s) RICHARD A. LICHT

United States Court of Appeals
For the First Circuit

No. 81-1047

AUBURN NEWS COMPANY, INC., ET AL.,

PLAINTIFFS-APPELLEES,

v.

PROVIDENCE JOURNAL COMPANY, ET AL.,

DEFENDANTS-APPELLANTS.

Before

CAMPBELL, BOWNES and BREYER,
Circuit Judges.

Joseph V. Cavanagh, Jr., with whom *Edward F. Hindle*, *Edwards & Angell*, *Daniel C. Kaufman*, and *Waddey, Lundin & Newport* were on brief, for appellants.

Frank Licht and *David L. Foster*, with whom *Richard A. Licht*, *Letts, Quinn & Licht*, *Howard C. Buschman, III.*, *Richard L. Posen*, *Jack A. Pawa*, *Willkie, Farr & Gallagher*, *Austin T. Stickells*, *Leonard Decof*, and *Decof & Grimm* were on brief, for appellees.

Argued June 2, 1981
Decided September 23, 1981

BOWNES, *Circuit Judge*. Defendant-appellant Providence Journal Company (Journal) and its wholly-owned subsidiary, defendant-appellant Southern New England News Distributors, Inc. (SNENDI) appeal from a preliminary injunction of the District Court for the District of Rhode Island, enjoining them from refusing to deal with plaintiffs-appellees, eighteen independent wholesale newspaper distributors, and from using their customer lists. We vacate that part of the preliminary injunction enjoining appellants from not doing business with appellees. Because appellants apparently did not

object to that part of the preliminary injunction forbidding them from using the customer list of appellees,[1] we do not review it on appeal.

The Journal, a privately-owned corporation in Rhode Island, publishes and circulates *The Providence Sunday Journal*, *The Providence Journal* (Monday-Friday morning newspaper), *The Evening Bulletin* (Monday-Friday afternoon newspaper), and the *Providence Journal Bulletin* (Saturday morning newspaper) throughout Rhode Island and southeastern Massachusetts. *The Evening Bulletin* is the only newspaper facing direct competition from other Rhode Island local papers. The Journal's subsidiary, SNENDI, distributes directly to store accounts and to home delivery carriers in parts of Rhode Island and southeastern Massachusetts. The Journal determines SNENDI policy and its circulation department employees directly supervise SNENDI personnel on a daily basis.

Appellees are sole proprietorships, family partnerships and family corporations which own and operate independent wholesale newspaper distribution businesses. They mainly purchase and resell Journal newspapers to home delivery carriers and store accounts in areas not directly covered by the Journal. During the week, most appellees do not distribute non-Journal newspapers. Two of the appellees supply less than three dozen copies of out-of-town newspapers (New York Times, New York News, Boston Globe and Boston Herald) on weekdays, and a third distributes 137 copies daily of the Attleboro Sun Times. On Sundays, appellees distribute out-of-town newspapers to their retailers. They and the Journal operate in geographically separate areas. Although such territorial division was not an explicit condition of the relationship between either the appellees and the Journal or among the appellees themselves, the arrangement was respected by all. The absence of price competition benefited the appellees.

[1] In their brief and reply brief, appellants do not discuss this prohibition at all.

The Journal distributed its paper through independent distributors until 1973. Its creation in that year of SNENDI with the object of directly entering the distributorship business was a marked shift from its prior reliance upon the independent distributors. At a breakfast of independent distributors called by the Journal in March 1973, its circulation director further emphasized the move towards an in-house distribution system; he announced that the Journal would purchase distributorships from those independents who wished to sell "at fantastic prices, starting at 100% increase above cost," rising "all the way to 800-900% and/or over," and that, in effect, it would not recognize the sale of distributorships, except to those who were part of the immediate family of the current distributors. This policy would thus foreclose the acquisition of new distributorships by independent wholesalers, and fortify the Journal's direct role in the distribution of its newspapers. In fact, the Journal did not always adhere to its new policy; it did do business with six distributorships sold to third parties. But as an aftermath of the breakfast meeting, the Journal did acquire about thirty distributorships through SNENDI so that it had direct dealing with retailers accounting for 50% of the Journal's circulation.

In late 1979 or early 1980, the Journal sought to complete the change in its method of distribution. In a letter of August 11, 1980, it told all independent distributors that effective September 6, 1980, it would not sell its newspapers at wholesale rates to them. Direct sale and distribution of newspapers, the Journal explained, would result in a more efficient economical system and provide more uniform service to the readership. It also stated that it would be "pleased to discuss. . . a reasonable offer for the purchase of. . . subscriber lists of Journal newspapers" and that the offer of purchase would expire at the close of business on Friday, September 5, 1980. Fourteen of the thirty-two independent distributors with whom the Journal was then dealing sold out to it;

appellees are the remaining eighteen distributors who did not. The Journal also informed store proprietors served by appellees that they "would be receiving [their] papers directly from the Providence Journal Company." In addition, the Journal placed advertisements in its newspapers informing home delivery carriers that they had to contact the Journal if they wanted to continue delivering Journal papers.

On September 2, 1980, the independent distributors brought suit challenging the direct distribution plan. They filed a thirteen-count complaint alleging that the Journal had conspired to restrain trade and destroy competition in violation of § 1 of the Sherman Act, 15 U.S.C. § 1,[2] and that it had monopolized and attempted to monopolize trade in contraven-

[2] 15 U.S.C. § 1 states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

tion of § 2 of the Sherman Act, 15 U.S.C. § 2.[3] They also asserted parallel claims under the Rhode Island Antitrust Act, R.I. Gen. Laws §§ 6-36-1 *et seq.*, as well as common law claims of unfair competition and tortious interference with contractual relations. Plaintiffs' complaint prayed for treble damages and for interim and permanent injunctive relief. Together with their complaint, they filed a motion for a temporary restraining order, which the court below issued pending hearing and determination of the motion for preliminary injunction.

Discovery was expedited, but could not be completed because of the pressures of time. Nevertheless, numerous depositions were taken, extensive documentary evidence was produced, and the hearing on the preliminary injunction consisted of seven days of trial and a half day of argument. The district court heard fifteen witnesses, including four experts. It determined that the plaintiffs had demonstrated adequate grounds for issuance of a preliminary injunction—that they would suffer irreparable harm if defendants were not enjoined, that the balance of harm tipped in the direction of the plaintiffs, that they established a public interest requiring preliminary relief, and that they produced credible evidence which, if accepted at the hearing on the merits, would result in ultimate success. The court employed the "alternative test" standard enunciated in the Second Circuit, *see, e.g.*, *United States* v. *Bedford Associates*, 618 F.2d 904, 912 n.15 (2d Cir. 1980), that the plaintiff need not make as persuasive a showing that he is likely to succeed on the merits where other factors are strong, such as the potential harm to plaintiff and

[3] 15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

the lack of a similar potential for harm to defendant. In granting the injunction, the district court rejected treble damages as an adequate remedy at law, concluding that such an award (1) would convert litigation "into a kind of private eminent domain proceeding" in which the Journal would "have purchased Plaintiffs' businesses, at a price determined by the Court"; (2) would fail to recognize the interests of the many retailers not party to the action; and (3) would obstruct "the lofty purpose of the Sherman Act." In its order entered December 23, 1980, the district court enjoined the Journal *pendente lite* from "refusing to deal with plaintiffs and from using plaintiffs' customer lists"; plaintiffs were required to post a $30,000 bond without surety.

Before this court, appellants argue that the district court erred as a matter of law in granting the preliminary injunction by not requiring that plaintiffs show a probability of success on the merits; that plaintiffs, contrary to the district court's determination, had an adequate remedy at law; and that the district court, in effectively enjoining the Journal's conversion to a direct wholesale distribution system, misapplied fundamental antitrust principles, and failed to accept the Journal's valid business reasons for the conversion to a direct distribution system.

We begin by observing that private parties may be afforded preliminary injunctive relief in antitrust cases

> when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity, . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate.

15 U.S.C. § 26. We, therefore, briefly review our standard for granting a preliminary injunction. We adhere, of course, to the basic requirement, which originated centuries ago in the English Court of Chancery, that before such relief becomes available there must be a showing that there is no adequate remedy at law. In addition, we reiterate that

> "[i]n the First Circuit, a plaintiff must satisfy four criteria in order to be entitled to a preliminary injunction. The Court must find: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction."

Planned Parenthood League v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981), *quoting Women's Community Health Ctr., Inc.* v. *Cohen*, 477 F. Supp. 542, 544 (D. Me. 1979) (citations omitted). "Application of these standards to a particular set of facts is not a mechanical process." *Nat. Tank Truck Carriers, Inc.* v. *Burke*, 608 F.2d 819, 823 (1st Cir. 1979). None of these criteria should be slighted. The moving party must exhibit a likelihood of success on the merits; indeed, the probability-of-success component has loomed large in cases before this court. *See, e.g., Planned Parenthood League* v. *Bellotti*, 641 F.2d at 1009-1022; *Conservation Law Foundation of New England, Inc.* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979); *Grimard* v. *Carlston*, 567 F.2d 1171 (1st Cir. 1978).

At the stage of appellate review, the "decision to grant or deny a preliminary injunction...is reversible...only for an abuse of discretion. It is also well settled, however, that the application of an improper legal standard in determining the likelihood of success on the merits is never within the district court's discretion. Similarly, misapplication of the law to particular facts is an abuse of discretion." *Planned Parenthood League* v. *Bellotti*, 641 F.2d at 1009, *quoting Charles* v. *Carey*, 627 F.2d 772, 776 (7th Cir. 1980) (citations omitted).

We assess the particular claims in the case at hand in terms of two analytically distinct periods—before and after August 11, 1980, when the Journal announced its intention in a letter to distributors to assume total control of the distribution

system. In our view the action taken in each period has different antitrust consequences. With respect to conduct before the August 11 notice, the independent distributors allege that the Journal combined with SNENDI to price-fix and that the Journal coerced them to combine with it to do the same as well. In the course of a hearing on the preliminary injunction, independent distributors testified that the Journal's approval of them as franchisees was tacitly contingent upon their agreeing to the Journal's suggested retail price; some claim to have suffered late deliveries when they raised the price of the papers to their carriers; and some testified that they were told that they could not raise the price of their papers to meet increased costs of distribution. To be sure, maximum price-fixing is per se illegal, *Albrecht* v. *Herald Co.*, 390 U.S. 145, 151-53 88 S.Ct. 869, 872-873, 19 L.Ed. 2d 998 (1968). But however strong appellees case may be on the merits with respect to the Journal's conduct before the August 11 letter, they cannot secure preliminary injunctive relief unless they can show that an adequate remedy at law is not present. Their injury may be substantial, but we are not persuaded that such remedy—treble damages—is inadequate. Section 4 of the Clayton Act provides for such an award to any person "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. It seems to us that if the independent distributors prevail on the merits of their claims, they should be able to demonstrate actual and measurable injury to their businesses or properties was caused by the antitrust violations; the remedy of treble damages would therefore be entirely adequate.

We consider next appellant's behavior after August 11, as indicated in its letter of that date. Appellees contend that the Journal's decision to assume completely the distribution function was anticompetitive and in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. In essence, appellant decided to vertically integrate downstream—that is, to undertake the distribution of its products which had been and could

be sold to independent producers or distributors. 3 P. Areeda and D. Turner, *Antitrust Law* ¶ 724, at 195 (1978). Vertical integration may come in a variety of forms with different impacts on economic performance.[4] Where substantial market power is absent at any one product or distribution level, vertical integration will not have an anticompetitive effect. Vertical integration by a monopolist, however, can have adverse consequences on competition because monopoly at one level of the production-distribution continuum may carry with it the ability to affect competition in earlier or later phases. Moreover, the lack of competition may have negative effects on efficiency and progressiveness. *See* F. M. Scherer, Industrial Market Structure and Economic Performance 405 (1970). But vertical integration can also result in economic advantage to society. It can result in savings in market transaction costs and production economies. New efficiencies and innovations may ultimately yield lower prices on the end product. Integration can thus be a good faith effort to do business in more efficient ways.

Any assessment of vertical integration must take into account the variables present in the particular situation. As the Supreme Court stated, it is "clear . . . that vertical integration, as such without more, cannot be held violative of the Sherman Act. . . . [T]he extent of permissible integration must be governed, as other factors in Sherman Act violations, by the other circumstances of individual cases." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 525-26, 68 S.Ct. 1107, 1123, 92 L.Ed. 1533 (1948). In the specific context of the case before us, we cannot see how the kind of vertical integration at issue—integration into distribution—violates the antitrust laws. Appellants seek to better control and market their product by changing their distribution structure. *See, e.g., Naify* v. *McClatchy Newspapers*, 599

[4] The literature on vertical integration has become quite substantial. For an overview of the different approaches, *see, e.g.*, Kaserman, Theories of Vertical Integration: Implications for Antitrust Policy, 23 *Antitrust Bulletin* 483 (1978).

F.2d 335, 336 (9th Cir. 1979); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 805 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). They assert that the direct system would result in uniformity of sales, service and promotion across the market. Their experts testified that newspapers secure most of their revenue from advertising, that implementation of the direct wholesale distribution system, by enabling the Journal to build its distribution base, would enhance its ability to attract and retain advertisers. The objectives of appellants, as witnesses testified, were sometimes in conflict with appellees' goal of maximizing profits on the sale of newspapers. It was appellees, not appellants, who sought to charge higher prices to consumers, and it must not be forgotten that it is ultimately consumers whom the antitrust laws are designed to protect. This case, moreover, is not one in which vertical integration would drive out competition; appellees concede that they do not compete among themselves. The core of the distributors' case is that they cannot remain in business on the revenues secured from the sale of non-Journal publications. While this is unfortunate for them, we cannot mandate that the Journal, in effect, bear the distribution costs of its competitors by maintaining the old distribution network.

With respect to all antitrust claims made under state law, we reach the same results, observing simply that Rhode Island law provides that its antitrust statutes "be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable." R.I. Gen. Laws § 6-36-2(c) (Supp. 1980).

Reversed and remanded.

United States Court of Appeals
For the First Circuit

No. 81-1047

AUBURN NEWS COMPANY, INC., ET AL.,
PLAINTIFFS, APPELLEES,

v.

PROVIDENCE JOURNAL COMPANY, ET AL.,
DEFENDANTS, APPELLANTS.

Before CAMPBELL, BOWNES & BREYER,
Circuit Judges.

ORDER OF COURT
Entered October 22, 1981

Upon consideration of appellees' petition for rehearing,
It is ordered that the same be and hereby is denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

United States Court of Appeals
For the First Circuit

No. 81-1047.

AUBURN NEWS COMPANY, INC., ET AL.,
PLAINTIFFS, APPELLEES,

v.

PROVIDENCE JOURNAL COMPANY, ET AL.,
DEFENDANTS, APPELLANTS.

ORDER OF COURT
Entered October 23, 1981

Upon motion of appellees, to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by November 30, 1981 and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed.

By the Court:
/s/ DANA H. GALLUP
Clerk.

PROVIDENCE JOURNAL COMPANY

Re: Administration

Development of a Plan for the Change In the Journal's Distribution System

In order for the Journal to develop a sound plan to change the remaining independent distributorship system not yet acquired by S.N.E.D. to an employee system, the following matters should be considered and developed as fully as possible. Other areas not discussed in this memorandum may require factual consideraton to fully develop the plan. The Journal's exposure to litigation in changing its distribution system to an employee system is virtually certain. Its exposure to liability is in large part based on the full development of the factual background outlined below. Such development of the facts is essential if the Journal is to survive the first critical hurdle in the litigation that is certain to result, that of getting successfully by a motion for a preliminary injunction.

This memorandum is not intended to be all inclusive. It is intended to serve as a basis for exploring all possible ways to make the most sound presentation of the necessary evidence and the legal conclusions to be derived therefrom which will persuade a court to deny a motion for a preliminary injunction. The development of this plan should include the following factors:

1. Background and history of Providence Journal Company as a newspaper publisher.

2. Background and history of the Providence Journal's system of distribution of its newspapers.

3. Present status of the distribution system for the Providence Journal's newspapers.

4. The relevant product market — does it consist of metropolitan daily newspapers of general circulation such as the Woonsocket Call, the Pawtucket Times, the Newport News, the Pawtucket Valley Times, the Westerly Sun, and any other daily newspapers of general circulation in the territory serviced by the Providence Journal, as for example the Fall River Herald News and the Attleboro Sun?

5. Relevant geographic market — is the State of Rhode Island and neighboring Massachusetts communities served by daily newspapers of general circulation throughout the area served by the Providence Journal newspapers?

6. Does the Providence Journal, as a newspaper publisher, occupy a monopoly position in the relevant product market and the relevant geographic market?

7. Does the Providence Journal, as a distributor of its newspapers, occupy a monopoly position in the relevant geographic market?

8. What valid business reasons exist to warrant a change in the Journal's system of distribution of its newspapers:

(a) Direct customer solicitations?

(b) Promotions and prizes for increased sales?

(c) Centralized billing?

(d) Centralized collections?

(e) Centralized customer complaints?

(f) Centralized service requests?

(g) Pay by mail system of billing customers?

(h) Control of quality of delivery service to customers?

(i) Computerization of certain procedures?

(j) Increased market penetration of in-sales of newspaper?

(k) Increased advertising penetration of the market?

(l) Simplification of pricing structure?

(m) Space and personnel required to staff the new distribution system?

(n) Equipment and facilities necessary to control the new distribution system?

(o) Internal cost controls?

9. What are the reasons, both major and minor, that make the present system of distribution unsatisfactory?

10. What economic benefits will result if the distribution system is changed?

11. What benefits will accrue to Journal customers from a change-over in the distribution system?

12. Internal factual studies to support

(a) the best reasons for a change in the distribution system, and

(b) to establish the basis for the unsatisfactory present system.

13. External studies and expert opinions required to support the change in the distribution system.

14. The implementation of the new system and the time frame within which this can be accomplished.

15. Legal documentation of contracts and other documents required to establish the full change-over.

16. Dissolution of S.N.E.D. and incorporation into Providence Journal Company's operations.

17. Right of Journal employees to deliver other newspapers now in the market or other newspapers that may enter the market.

Opposition

Supreme Court, U.S.
FILED
DEC 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-1009.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

AUBURN NEWS COMPANY, INC., ET AL.,
PETITIONERS,

v.

PROVIDENCE JOURNAL COMPANY,
SOUTHERN NEW ENGLAND NEWS
DISTRIBUTORS, INC.,
RESPONDENTS.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

EDWARD F. HINDLE,
JOSEPH V. CAVANAGH, JR.,
EDWARDS & ANGELL,
2700 Hospital Trust Tower,
Providence, Rhode Island 02903.
(401) 274-9200

DANIEL C. KAUFMAN,
WADDEY, LUNDIN & NEWPORT,
500 Church Street,
Nashville, Tennessee 37219.
(615) 244-7545

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Questions Presented.

Respondents Providence Journal Company and Southern New England News Distributors, Inc.* submit that Petitioners' statement of the questions presented does not fairly reflect the factual and legal bases of the decision sought to be reviewed. Respondents, while not suggesting that a writ of certiorari should issue, respectfully urge that the questions presented are more properly framed as follows:

1. Whether plaintiffs who have not shown themselves likely to secure permanent injunctive relief may obtain a preliminary injunction merely on a showing that the balance of hardships tips decidedly in their favor?
2. Whether a manufacturer's vertical integration into wholesale distribution violates federal antitrust laws absent an immediate and substantial adverse impact on actual competition?
3. Whether federal antitrust laws bar a manufacturer from seeking to secure lower consumer prices by streamlining its distribution system?

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* Pursuant to Rule 28.1 of the Supreme Court Rules, Respondents state that the non-wholly-owned subsidiaries of the Providence Journal Company are: Copley/Colony, Inc., Colony/Harbor Cablevision, Inc., Colony Microband of Massachusetts, Inc., Colony Microband of Rhode Island, Inc., Dynamic Cablevision of Florida, Inc., Greater Fall River Cable TV, Inc., Mass. Cablevision, Inc., Metro Cablevision Corp., Mobile-Pensacola Broadcasters, Inc., Network Publishing Co., Inc., Torrance Community Cablevision, Inc., Vision Cable Company of Rhode Island, Inc., and Whaling City Cable TV, Inc. Biltmore Associates is a non-subsidiary affiliate of the Providence Journal Company.

Southern New England News Distributors, Inc., formerly a wholly-owned subsidiary of the Providence Journal Company, has been dissolved.

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No. 81-1009.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

AUBURN NEWS COMPANY, INC., ET AL.,
PETITIONERS,

v.

PROVIDENCE JOURNAL COMPANY,
SOUTHERN NEW ENGLAND NEWS
DISTRIBUTORS, INC.,
RESPONDENTS.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Jurisdiction.

The District Court rendered its decision on November 14, 1980 [Appendix ("A")-1, 504 F. Supp. 292] and entered a preliminary injunction against the Respondents on December 23, 1980 (A-22). On September 23, 1981, the Court of Appeals issued its opinion vacating a portion of the interlocutory order (A-24, 659 F.2d 273). On October 23, 1981, that Court stayed the issuance of its mandate pending the filing of the Petition for Issuance of a Writ of Certiorari by November 30,

1981. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

Statement of the Case.

The Providence Journal Company ("Journal") produces and publishes newspapers in Providence, Rhode Island. Journal newspapers are published in morning and evening editions on weekdays and in a morning edition on Saturdays and on Sundays and generally circulate throughout Rhode Island and adjacent areas of southeastern Massachusetts. The circulation patterns of the seven other daily newspapers published in that market are more concentrated and confined to their respective cities of publication and environs. The only other newspapers of state-wide circulation are published in New York City (*New York Times* and *New York Daily News*) and Boston (*Boston Globe* and *Boston Herald*).

The Journal's market pattern may be accurately characterized as a "Swiss cheese." In the City of Providence and in certain rural and suburban portions of its circulation area, a majority of readers purchase Journal newspapers. In those areas where a competing daily newspaper is published—notably in and around Newport, Pawtucket, Westerly and Woonsocket, Rhode Island, and Attleboro and Fall River, Massachusetts—the local publication enjoys a distinct circulation advantage.

Prior to 1973, the Journal sold its newspapers to independent wholesalers[1] who, in turn, resold these newspapers to

[1] The wholesalers, with few exceptions, confined their weekday activities to the Journal newspapers, handling the New York and Boston newspapers only on Sundays. The revenues derived by the wholesalers from the sale of non-Journal newspapers could not support their operation. The other publishers in Rhode Island and southeastern Massachusetts typically sold directly to retailers, as did the New York and Boston publishers during the week.

local home delivery carriers, typically teenagers on foot and bicycle routes, and to newsstands and stores known in the trade as single-copy outlets. Thus, there are three successive sales involved: (1) from the Journal to the wholesalers; (2) from the wholesalers to the carriers and single-copy outlets; and (3) from the carriers and single-copy outlets to readers.

The relationship between the Journal and the wholesalers has never been reduced to a written contract or formal agreement. Nor was there a written contractual relationship between the wholesalers and the home delivery carriers and single-copy outlets with whom they dealt. Rather, the sale of Journal newspapers for resale has always been carried out on the basis of a day-to-day course of dealing.

Each wholesaler was located in a different area of the market and, without coercion or agreement, "the boundaries of each distribution area crystalized" over the years (A-2, 504 F. Supp. at 295). Consequently, there has been, to the benefit of the wholesalers, an absence of competition among them (A-25, 659 F.2d at 275).

In 1973, the Journal established a wholly-owned subsidiary, Southern New England News Distributors, Inc. ("SNENDI"), to sell and distribute Journal newspapers directly to retailers. The Journal, through SNENDI, began acquiring distributorships from those wholesalers who wished to sell and, thereafter, sold directly to home delivery carriers and single-copy outlets formerly served by these wholesalers. Each distributorship was initially operated by the Journal as a separate "agency" much as it had been operated by its predecessor. The Journal thereafter consolidated and realigned the distribution areas of its agencies; it did not, however, seek out home-delivery carriers and single-copy outlets in areas served by the remaining independent wholesalers. Thus, at all pertinent times, the wholesalers competed neither among themselves nor with

the Journal agencies (A-25, 33, 659 F.2d at 274-75, 278; A-2, 13, 504 F. Supp. at 295, 301).

As it gained experience with direct distribution, the Journal came to realize that the wholesalers' interests inevitably diverged from its own. Mass media publishers such as the Journal sell two "products"—the physical newspaper, purchased by readers, and space in that newspaper, purchased by advertisers seeking to reach those readers. The bulk of a typical publisher's revenues are derived from the latter, in the Journal's case approximately 75%.[2] Not surprisingly, a newspaper which reaches more readers is more desirable to advertisers and, accordingly, can obtain more advertising and command higher advertising rates (A-33, 659 F.2d at 278; A-14, 504 F. Supp. at 301). The Journal thus had a keen interest in maximizing circulation, even at some expense to revenues derived from sales to readers, for the increased advertising revenue could more than offset such losses.

It was the Journal's interest that its newspapers be reasonably priced, that readers be satisfied with service, and that anyone in its circulation area who wished to obtain its newspapers have a reasonable opportunity to do so.[3] The independent wholesalers, on the other hand, pursued but a single goal—maximum profit from sales to readers. They were thus inherently more willing to tolerate lost readership due to poor service and high prices and were less inclined to serve sparsely populated and developing areas. The Journal and the independent wholesalers thus strove for oft conflicting goals. Tha

[2] Indeed, one genre of newspaper, typically published weekly or biweekly, known as "shoppers," are given away. All shopper revenues are derived from the sale of advertising space.

[3] The Journal, of course, was also interested in building its readership base through improved graphics and content, as well as timely and high quality production. Although these aspects of its operations were within its exclusive control, the matters addressed in the text were, at least in part, in the hands of the wholesalers.

Journal, moreover, sought to improve its market penetration through statewide promotional campaigns and a centralized customer service center. Implementation of these measures could be significantly foreclosed by even a single wholesaler's refusal to cooperate.

By mid-1980, the Journal was directly distributing about one-half of its circulation to the carriers and single-copy outlets in areas formerly served by some thirty wholesalers. The remainder of its circulation was handled through thirty-two independent wholesalers. It had become clear to the Journal that direct wholesale distribution was a success; the Journal agencies had outperformed the independent wholesalers in market penetration and customer satisfaction.

By letters dated August 11, 1980, the Journal gave the remaining wholesalers some four weeks' notice that the Journal would implement direct wholesale distribution across the board by discontinuing sales to wholesalers for resale to home delivery carriers and single-copy outlets. The letters invited the wholesalers to discuss the sale of their respective Journal subscriber lists to the Journal. Fourteen wholesalers satisfactorily concluded such discussions; the remaining eighteen filed suit in the United States District Court for the District of Rhode Island, charging violations of federal and state antitrust statutes and tortious conduct under state common law.[4]

Shortly before its announced effective date, the Journal's conversion to direct wholesale distribution was prevented by a temporary restraining order. There followed a brief, albeit intensive, period of discovery and an evidentiary hearing consuming seven trial days. Some five weeks following the hearing, the district court issued an opinion concluding that the

[4] While formal stipulations of dismissal have not been entered, nine of the original plaintiffs have withdrawn from the litigation.

Journal should be preliminarily "enjoined from refusing to deal with Plaintiffs" (A-21, 504 F. Supp. at 305). An order to that effect was entered five weeks later (A-22, 23).

The district court recognized, but did not apply, the traditional four-fold test for injunctive relief *pendente lite*—plaintiffs' probability of ultimate success on the merits, threat of irreparable injury to plaintiffs, balance of harm in plaintiffs' favor, and public interest. Instead, the court utilized the so-called "alternative test" under which, upon a showing that the balance of hardships tipped decidedly in their favor, plaintiffs could secure such relief by "rais[ing] questions going to the merits which are so serious, substantial, difficult and doubtful, as to make them fair ground for litigation" (A-7, 504 F. Supp. at 298). The court accordingly eschewed resolution of evidentiary conflicts, thereby seeking to avoid "any prejudgment of the facts as they might be ultimately found at a hearing on the merits." (A-8, 504 F. Supp. at 298).[8]

In its legal analysis, the district court recognized that the Journal's proposed vertical integration was not *per se* unlaw-

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[8] Petitioners ground their arguments upon the findings of fact which they insist were made by the district court (Petition at 5-6). However, the passage quoted in the text, as well as the explicit language throughout the district court opinion, conclusively refute that contention. For example, in the district court's view, "[e]vidence was presented which, *if believed by* the ultimate finder of fact, would support a conclusion of price fixing" (A-10, 504 F. Supp. at 299) (emphasis added); "it is *quite possible* to find that [SNENDI] combined with the Journal to coerce Plaintiffs with (sic) maintaining the Journal's price schedule" (A-11, 504 F. Supp. at 300) (emphasis added); although "there is no competition in the secondary newspaper distribution market . . . an anti-competitive effect *might* be caused by the elimination of Plaintiffs from this secondary market, for . . . out-of-state and other Rhode Island newspapers *possibly* act as a competitive force" (A-13, 504 F. Supp. at 301) (emphasis added); "plaintiffs *might well* demonstrate an attempt to monopolize" (A-19, 504 F. Supp. at 304) (emphasis added).

ful, that no actual competition would be lessened thereby, and that the Journal had articulated a number of sound business reasons for its planned course of action (A-13-14, 504 F. Supp. at 301). However, in its view, the other Rhode Island-based newspapers and the newspapers published in New York City and Boston "possibly act as a competitive force . . ., 'waiting in the wings,' thereby acting as a competitive check on the Journal," and the court observed that potential market competitors would be forced to enter the market at both the publication level and the distribution level simultaneously if the plaintiffs were no longer in business (A-13, 504 F. Supp. at 301).

Respondents, invoking appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), timely prosecuted an interlocutory appeal to the United States Court of Appeals for the First Circuit. The appellate court vacated the injunction, holding that the district court's analysis was fundamentally flawed. (A-30, 659 F.2d at 277).[6] The Court of Appeals, moreover, held that the Journal's planned vertical integration was devoid of probable anticompetitive consequences—

> "In the specific context of the case before us, we cannot see how the kind of vertical integration at issue—integration into distribution violates the antitrust laws . . . This case, moreover, is not one in which vertical integration would drive out competition; [Petitioners] concede that they do not compete among themselves." (A-32-33, 659 F.2d at 278).

As to the entry barriers faced by potential new market entrants, the court declined to "mandate that the Journal, in effect, bear the distribution costs of its competitors by maintaining the old distribution network" (A-33, 659 F.2d at 278).

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[6] The Court of Appeals disposed of petitioners' pre-conversion price fixing claims by noting the availability of a treble-damage remedy. (A-31, 659 F.2d at 277).

Petitioners timely sought and were denied rehearing and rehearing *en banc*. The mandate of the Court of Appeals has been stayed pending disposition of the petition.

Reasons for Denying the Petition.

Summary of Argument.

As Respondents will show more fully in Part A hereof, the United States Court of Appeals for the First Circuit properly insisted that Petitioners bear the burden of showing a probability of ultimate success on the merits as a predicate for securing the extraordinary relief of a preliminary injunction. Respondents will also show that the First Circuit's decision would foreclose interim injunctive relief, even under the relaxed equitable standards for which Petitioners contend.

Respondents submit, moreover, that the substantive antitrust issues for which Petitioners seek review are not ripe for plenary consideration by this Court. *See*, e.g., *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *American Construction Co. v. Jacksonville, T & K.W. Ry*, 148 U.S. 372, 384 (1893). In the interests of completeness, however, Respondents will address those issues in Part B hereof, demonstrating that the decision of the court below is in full accord with those of this Court and of the other courts of appeals which have considered the question.

In short, Petitioners have shown no special and important reasons for plenary review in this Court. *See* Sup. Ct. Rule 17.1. This case does not warrant the exercise of this Court's discretionary certiorari jurisdiction.

Argument.

A. The Court of Appeals Properly Placed the Burden on Petitioners to Demonstrate the Likelihood that They Would Ultimately Secure a Permanent Injunction Barring Vertical Integration by the Journal.

Entry of a preliminary injunction has long been recognized as a drastic and extraordinary remedy, for the conduct enjoined may well be lawful. *Rizzo v. Goode*, 423 U.S. 362, 378 (1976). Accordingly, courts of equity have historically undertaken a tentative inquiry into the legal and factual merit of the movant's case and sought to ascertain the likely consequences of granting or withholding interim injunctive relief. This analysis, largely predictive, revolves around four criteria—

> "The Court must find: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction." (A-30, 659 F.2d at 277) (citations omitted).[7]

These criteria are not to be mechanically applied to the particular facts at issue; nor are any of them to be slighted (*Id.*).

Apparently recognizing that they have not exhibited a likelihood of ultimate success on the merits, Petitioners urge this Court to resolve the conflict between the First Circuit and

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[7] This Court has reaffirmed that those who seek preliminary injunctive relief have the burden of demonstrating both irreparable injury and likelihood of ultimate success. *See, Dorus v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974).

those Courts of Appeals which utilize the so-called "alternative test" generally attributed to the Second Circuit.—

> "[W]here the balance of hardship tips decidedly toward the party requesting the temporary relief . . . [he] may obtain a preliminary injunction if he has raised questions going to the merits so serious, substantial, and difficult as to make them fair ground for litigation and thus for more deliberate investigation." *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir. 1969), *cert. denied*, 394 U.S. 999 (1969), (citation omitted).

The case at bar is singularly inappropriate for resolution of the conflict between the Circuits for two reasons. At the outset, it must be observed that the First Circuit's decision reflects a substantive legal analysis which forecloses interim relief even under the standards for which Petitioners contend. Moreover, while cases applying the alternative test have involved disputes capable of ultimate resolution through entry of a permanent injunction, fundamental equity principles preclude entry of a decree permanently continuing the relationship between the Journal and Petitioners. Thus, the inter-circuit conflict is not squarely presented here.

The Court of Appeals rightly insisted that the legality of vertical integration could not be assessed in a vacuum, but "must take into account the variables present in the particular situation," for "[t]he 'extent of permissible integration must be governed . . . by the other circumstances of individual cases.' " (A-32, 659 F.2d at 278, quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 525-26 (1948)). The Court accordingly concluded that "[i]n the specific context of the" instant case it could not "see how the kind of vertical integration at issue—integration into distribution—violates the antitrust laws," *Id.* This conclusion was predicated on undis-

puted basic facts[8]—the acknowledged conflict in goals between the wholesalers and the Journal, coupled with the absence of actual competition at the wholesale distribution level. Thus, Petitioners cannot fairly be said to have presented antitrust questions of such substantiality, seriousness, and difficulty as to make them fair ground for litigation. Even under the alternative test which they advance, interim injunctive relief is not available to Petitioners.

The central purpose of a preliminary injunction is the maintenance of the status quo *pendente lite* to preserve the court's ability to fashion meaningful final relief. Thus, interim injunctive relief which cannot be finalized into a permanent injunction simply defers the inevitable and may in no sense be regarded as ancillary to the court's ultimate jurisdiction to enter a final decree. In the instant case, a permanent injunction directing the Journal to perpetually continue an ill-defined, unwritten arrangement would be wholly at odds with traditional doctrines of equity. Enforcement of such a decree would inevitably enmesh the district court in constant supervision of the minutiae of circulation management.[9] Thus, the instant case is wholly inappropriate for ultimate equitable relief.

Respondents submit that this is not the appropriate case for this Court to revise guidelines for the lower courts in preliminary injunction matters. Whether or not this Court ap-

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[8] The Court of Appeals did not remand for resolution of the testimonial conflicts in the trial court, apparently concluding that the factual issues injected by the wholesalers were devoid of legal significance.

[9] The typical distributor termination case involves a refusal to deal with a single distributor for impermissible reasons. Accordingly, an injunction reinstating the dealer on equal terms with other dealers may provide a manageable remedy. Where, however, an entire distribution level is bypassed, the manufacturer and the trial court are left without objective standards. *See Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 863-864 (6th Cir. 1979).

proves relaxation of traditional equitable standards, Petitioners are not entitled to interim injunctive relief.

B. The Court of Appeals' Substantive Antitrust Analysis Is Consistent with the Decisions of This Court and of the Other Circuit Courts of Appeals, Which Hold That the Sherman Act Is Not Offended by Vertical Integration Devoid of Immediate and Substantial Anticompetitive Effects.

As noted above, the interlocutory nature of the decisions below is sufficient ground in itself to decline certiorari jurisdiction. However, Petitioners' mischaracterization of the decisions below and those assertedly in conflict with that of the First Circuit compel correction of the substantive arguments advanced by Petitioners.

The courts below recognized that vertical integration is not condemned, *per se*, by the Sherman Act. (A-32, 659 F.2d at 278; A-12-13, 504 F. Supp. at 300). This approach comports with the well-established teachings of this Court, *see United States v. Columbia Steel Co.*, 334 U.S. 495, 525-26 (1948), and of other lower federal courts, *see, e.g., Byars v. Bluff City News Co., Inc.*, *609 F.2d 843, 861 (6th Cir. 1979); Naify v. McClatchy Newspapers*, 599 F.2d 335, 336-37 (9th Cir. 1979); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 484 (D.D.C. 1977); *Hardin v. Houston Chronicle Publishing Co.*, 434 F. Supp. 54, 57 (S.D. Tex. 1977), *aff'd on other grounds*, 572 F.2d 1106 (5th Cir. 1978); *McGuire v. Times-Mirror Co.*, 405 F. Supp. 57, 66-67 (C.D. Cal. 1975); *Lamarca v. Miami Herald Publishing Co.*, 395 F. Supp. 324, 327 (S.D. Fla. 1975), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975). The Court of Appeals accordingly assessed the likely impact on the marketplace

and concluded that the Journal's vertical integration promised more efficient, streamlined distribution, hence lower prices and better service to consumers, and was devoid of anticompetitive effects. (A-32-33, 659 F.2d 278).

Petitioners urge that the Journal's circulation advantage over rival publishers requires a different analysis and insist that the First Circuit departed from this Court's holdings in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), as well as the holdings of the Fifth and Sixth Circuits—*Byars v. Bluff City News Co.*, *supra*; *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).[10] *Otter Tail*, *Eastman Kodak* and *Poster Exchange* were predicated upon trial court findings of substantial adverse impact on actual competition from, and total lack of articulated business reasons for, the challenged conduct. *See* 410 U.S. at 377, 273 U.S. at 375, 431 F.2d at 339-340. The Sixth Circuit's holding in *Byars* is not, as Petitioners insist, in conflict with that of the Court of Appeals below. Indeed, the *Byars* court took care to point out that neither *Otter Tail*, *Eastman Kodak*, nor *Poster Exchange* can be read to impose on a dominant firm "an absolute duty to deal . . . in the vertical integration context." (609 F.2d at 859). Rather, courts are obliged to give even the monopolist some leeway in business decision-making; only where integration is unreasonably anticompetitive and devoid of business purpose will the Sherman Act's proscriptions come into play. (*Id.* at 861-862). *See Mid-*

[10] Petitioners' reliance on *Paschall v. Kansas City Star Co.*, 605 F.2d 403 (8th Cir. 1979) for substantive antitrust holdings is, to say the least, misplaced. The Court there simply vacated permission for an interlocutory appeal, concluding that the case lacked ripeness; the legality, *vel non*, of vertical integration by a dominant publisher was explicitly reserved. 605 F.2d at 406-07.

Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1388-89 (5th Cir. 1980), *cert. denied sub nom.*; *Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co.*, 101 S.Ct. 286 (1980); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The decision below acknowledges the validity of the Journal's reasons for integration and notes the absence of anticompetitive consequences (A-32-33, 659 F.2d at 278). This critical distinction, uniformly recognized by the courts and conveniently ignored by Petitioners, eviscerates the claimed conflict.

Petitioners also assert that the Journal's vertical integration was tainted by prior efforts to impose a ceiling on resale prices, efforts which Petitioners charge exceeded the bounds of lawful suggestion.[11] However, Petitioners were not seek-

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[11] The Journal acknowledges that the fact-finder could resolve the testimonial conflict on the issue against it and does not here contend that the decision to grant or withhold the writ should turn on that narrow factual question. The Journal does, however, submit that the theoretical basis of this Court's condemnation of maximum resale price maintenance as *per se* unlawful—*Albrecht v. Herald Co.*, 390 U.S. 145 (1968)—was the correlative presumed illegality of vertically imposed territories announced the previous term in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). *See* 390 U.S. at 153-54. This Court's holding in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (overruling *Schwinn*) militates toward reexamination of *Albrecht* in an appropriate case.

The Court of Appeals below, moreover, properly held that any injury which Petitioners could prove they sustained by being forced to adhere to lower resale prices would be trebly compensated (659 F.2d at 277) and was thus not irreparable. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). The availability of an adequate legal remedy for the alleged wrong forecloses equitable relief, whether permanent or interlocutory. *See Sampson v. Murray*, 415 U.S. 61, 89-90 n.63 (1974).

ing injunctive relief below against forced adherence to maximum resale prices established by the Journal, for once the Journal integrated into wholesale distribution, it necessarily lost the ability to influence the wholesaler's pricing. Courts have consistently recognized the difference between selective termination of miscreant dealers and fundamental alteration of one's distribution structure. Complete replacement of a wholesale distribution network "is not an enforcement mechanism but a choice of an alternative form of distribution." *Knutson v. Daily Review*, *supra*, 548 F.2d 795, 805 (9th Cir. 1979); *Newberry v. Washington Post Co.*, *supra*, 438 F. Supp. at 475. Thus, the resale price maintenance issue raised by Petitioners is a false one.

Respondents submit that the Court of Appeals' antitrust analysis represents no departure from settled law. There is no need to review that analysis in this Court, particularly in light of the interlocutory character of the decisions below.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD F. HINDLE,
JOSEPH V. CAVANAGH, JR.,
EDWARDS & ANGELL,
2700 Hospital Trust Tower,
Providence, Rhode Island 02903.
(401) 274-9200

DANIEL C. KAUFMAN,
WADDEY, LUNDIN & NEWPORT,
500 Church Street,
Nashville, Tennessee 37219.
(615) 244-7545

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Petitioner's Reply Brief

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No. 81-1009

In the Supreme Court of the United States

OCTOBER TERM, 1981

AUBURN NEWS COMPANY, INC., *et al.*,
PETITIONERS,

v.

PROVIDENCE JOURNAL COMPANY, SOUTHERN NEW ENGLAND NEWSPAPER DISTRIBUTORS, INC.,
RESPONDENTS.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Of Counsel:
AUSTIN T. STICKELLS
765 Commonwealth Ave.
Boston, MA 02215

FRANK LICHT, Esq.
RICHARD A. LICHT, Esq.
LETTS, QUINN & LICHT
1616 Hospital Trust Tower
Providence RI 02903

LEONARD DECOF, Esq.
DECOF & GRIMM
One Smith Hill
Providence, RI 02903

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

A. THE SECOND CIRCUIT'S TEST SHOULD BE ADOPTED BY THIS COURT

Respondents argue that injunctive relief should not be available under either test on the issuance of a preliminary injunction, and state that injunctive relief should almost never be granted. One of the most compelling reasons for issuing a preliminary order is the need to prevent the judicial process from being rendered futile by Defendants' actions or refusals to act. Wright & Miller, *Federal Practice and Procedure:* Civil

§ 2947. *Canal Authority of State of Florida* v. *Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). It is thus equally important that the standards applicable to the granting of a preliminary injunction be clarified especially with respect to the probability of success standard. The standard of the Second Circuit in relation to the duties of the trial court is realistic and workable. The First Circuit defined the Second Circuit's alternative test as follows:

> The Plaintiff need not make as persuasive a showing that he is likely to succeed on the merits where other factors are strong, such as the potential harm to Plaintiff and the lack of a similar potential for harm to Defendant. A-28, 659 F.2d at 276.

The District Court's analysis squarely presents the problems which the First Circuit's rigid standard unnecessarily creates, A-6-8, 504 F. Supp. 296-8. If the First Circuit's standard is carried to its logical conclusion, it would inhibit a contrary finding upon hearing on the merits. A-7, 504 F. Supp. 298. At the same time it places an undue burden on plaintiffs to establish their case with the degree of certainty required by the First Circuit. It requires plaintiffs within the limited time allowed between the issuance of the temporary restraining order and the preliminary hearing to fully develop their case. The case before the Court clearly shows this weakness.

There were twenty-three days from the sudden announcement of Respondents' intent to acquire all distributors and to refuse to supply them with papers and the issuance of the temporary restraining order. There was a total of only twenty-one days for discovery and the development of the Petitioners' case before the hearing for the preliminary injunction. Considering the complexities of antitrust proceedings, the difficulties in finding the evidence and the witnesses with respect to the conspiracy, complex facts and the need for experts to determine competitive impact and the many other factors establishing a

violation, the Second Circuit's alternative test makes the best sense. The Second Circuit's standard recognizes the difficulties involved, and the fact that the trial court needs flexibility and is in the best position to act. If the standard of the First Circuit is accepted not only will it negate the purposes of Congress in specifically granting private litigants the remedy of injunction, 15 U.S.C. §26, in antitrust cases, serious injustice will be rendered to Petitioners' and future plaintiffs, especially when the antitrust action is brought not simply for damages but to preserve competition and thus protect consumers.

B. Because the First Circuit Court of Appeals Did Not Find Abuse of Discretion, It Is Essential To Determine the Effect of Vertical Integration by a Monopolist Resulting in Undue Restraint of Trade and Monopolization.

Respondents state that on the basis of the First Circuit's decision, the facts as found by the District Court, including the finding of possession of monopoly power, A-17-18, 504 F. Supp. at 307, should be ignored as being devoid of legal significance. This reasoning, if extended, would negate all appellate review and review upon petitions, and is inappropriate in this case when the existence of monopoly power was ignored on appeal.

In *Industrial Building Materials, Inc.* v. *Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1979), the Court stated:

> When a distributor is replaced by another, the public is given a substitute with no diminution in the number of distributors offering services, but when the manufacturer enters the field and then removes a distributor, the public is left with only the manufacturer instead of the manufacturer and the independent distributor. Accomplishment of this anticompetitive objective by a

manufacturer in a dominant market position by means of conspiracy and unfair tactics must surely be proscribed by the antitrust laws. *Id.* at 1342.

The case now before the Court is not a case involving the termination of a distributor, or the change of a distributor. It is a case of eliminating a whole distribution industry and complete change of structure with but one objective, under the guise of efficiency, the elimination of competition at both the primary level, publication, and the secondary level, distribution. It will permit complete control of prices, both of the product and advertisements in the newspaper market. Insurmountable barriers to entry will be erected to potential distributors and other newspapers.

Conclusion

For the reasons set forth above in conjunction with those set forth in Petitioners' Petition filed November 30, 1981, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,
AUBURN NEWS COMPANY, INC., *et al.*
By their attorneys,

FRANK LICHT, Esq.
RICHARD A. LICHT, Esq.
LETTS, QUINN & LICHT P.C.
1616 Hospital Trust Tower
Providence RI 02903

Of Counsel:
AUSTIN T. STICKELLS
765 Commonwealth Ave.
Boston, MA 02215

LEONARD DECOF, Esq.
DECOF & GRIMM
One Smith Hill
Providence, RI 02903